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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

LAWNWOOD MEDICAL CENTER, INC.,

Petitioner,

v.

SAMUEL H. SADOW,

Respondent.

On Petition for a Writ of Certiorari to The Court Of Appeal of Florida, Fourth District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The jury found that an officer of Lawnwood Medical Center defamed Dr. Samuel Sadow, and it awarded him $0 in compensatory damages and $0 in nominal damages but $5,000,000 in punitive damages. Under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), appellate courts must analyze three guideposts to determine whether an award of punitive damages is unconstitutionally excessive. The Florida Court of Appeal expressly declined to apply those guideposts, holding that state law and Lawnwood's net worth supported the award.

The question presented is whether the $5,000,000 award of punitive damages against Lawnwood—which may be the largest award ever upheld in a nominal damages case after *BMW*—is excessive in violation of the Due Process Clause, and whether the Florida court's handling of that question denied Lawnwood procedural due process. In particular, the Florida court's answers to the following subsidiary questions conflict with decisions of this Court and other lower courts:

1. Are punitive damages for intentional harm exempt from the guidepost analysis?
2. Can state law exempt punitive awards for certain conduct from the guidepost analysis mandated by the Federal Constitution?
3. When actual damages are small or nominal, may a court rely on the defendant's wealth—rather than awards in similar cases or comparable legislative penalties—as an objective indicator of whether a punitive award is constitutional?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states that it is a wholly owned subsidiary of Hospital Corp., LLC, which is privately held. No publicly owned corporation owns 10% or more of petitioner's stock. Petitioner's ultimate parent is Hercules Holding II, LLC, and some of Hercules's members are affiliated with Bank of America Corporation, which is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Lawnwood Medical Center Inc. respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida for the Fourth District in this case.

OPINIONS BELOW

The judgment of the Circuit Court for St. Lucie County, Florida (App., *infra*, 54a-55a) is unreported. The opinion of the court of appeal (App., *infra.*, 1a-52a) is reported at ___ So. 3d ___, 2010 WL 1066833. The court of appeal certified the following question to the Florida Supreme Court as one of "great public importance":

> Are punitive damages of $5,000,000 arbitrary or excessive under the Federal Constitution where the jury awarded no compensation beyond presumed nominal damages but found that defendant intentionally and maliciously harmed plaintiff by slanders per se?

App., *infra*, 51a. The Florida Supreme Court declined to exercise jurisdiction over this question and denied the petition for review in an unreported order. *Id.* at 53a.

JURISDICTION

The court of appeal affirmed the judgment on March 24, 2010. App., *infra*, 1a. The Florida Supreme Court denied review on April 27, 2010. *Id.* at 53a. On July 15, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 25, 2010. On August 17, Justice Thomas further extended the time to and

including September 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of * * * property, without due process of law * * * .

U.S. Const. Amend. XIV, § 1.

STATEMENT

The fundamental issue in this defamation case is whether a court can uphold punitive damages of $5,000,000 without applying the three guideposts this Court adopted to determine whether a punitive award is excessive in violation of the Due Process Clause of the Fourteenth Amendment. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). Dr. Samuel Sadow alleged that an officer of Lawnwood Medical Center made defamatory statements about him to one colleague, but he stipulated that he suffered no economic damages. The jury found defamation and awarded Dr. Sadow $0 in non-economic and $0 in nominal damages but $5,000,000 in punitive damages.

In affirming the award, the Florida Court of Appeal expressly rejected the guidepost analysis by: (1) substituting state laws on punitive damages for this Court's five-factor reprehensibility analysis; (2) comparing the size of the punitive award to the defendant's wealth rather than the plaintiff's harm; and (3) ignoring the comparable legislative penalty of $1,000. Thus, Lawnwood was denied the analytical procedures this Court requires to ensure that punitive awards comport with due process.

The Florida court correctly recognized that this decision is of "great public importance." App., *infra*, 51a. It exempts punitive damage awards from searching due process scrutiny in cases involving intentional harm or conduct that state law excepts from a punitive damages cap. Thus, awards in these large categories of cases will be constrained only by the court's subjective assessment of reprehensibility and the defendant's personal ability to pay. Furthermore, similar conduct by defendants will be subject to different federal constitutional limits depending on which State's law applies. These results are the antithesis of the fairness and predictability guaranteed by the Due Process Clause.

The Court should summarily reverse the Florida court's decision because it directly contradicts this Court's mandate that every appellate court conduct an exacting *de novo* review of the three guideposts. In addition, each of the Florida court's reasons for holding the guideposts inapplicable conflicts with decisions of this Court and other lower courts. For example, the court's position that the guideposts do not apply to intentional harm is contrary to *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which applied each guidepost to claims including intentional infliction of emotional distress. Similarly, the Florida court's decision not to apply the guideposts to conduct that state law marks for substantial punitive damages conflicts with *State Farm*'s holding that state law is no substitute for the constitutional principles set forth in *BMW*. And the Florida court's use of the defendant's wealth to determine whether the punitive award is proportional is precisely the sort of inflationary use of wealth evidence that *State Farm* condemned. When the guideposts are properly applied, they show that the

$5,000,000 award of punitive damages against Lawnwood is arbitrary and excessive.

Finally, this Court's review is needed to clarify what objective criteria ensure the reasonableness and predictability of punitive damages in cases where actual damages are small or nominal. The Florida court's decision to focus on the defendant's wealth conflicts with decisions of other courts that focus on punitive awards in comparable cases. Lawnwood has found no decision upholding a comparable punitive award in a defamation case, or in any case where compensatory damages are small or nonexistent. This lack of similar awards confirms that the $5,000,000 punitive award is excessive and should be reversed.

A. Factual background

This lawsuit is the result of a bitter business dispute between Dr. Sadow, his former partner Dr. Peter Downing, and Lawnwood Medical Center. When Lawnwood began building a new facility to offer cardiovascular surgery, Dr. Downing expressed interest in contracting for exclusive surgical privileges, while Dr. Sadow applied for non-exclusive privileges. The executive committee of the medical staff approved Dr. Sadow's application, but Lawnwood's board of trustees preferred an exclusive arrangement and contracted with Dr. Downing. Dr. Sadow then sued Lawnwood for breach of contract, alleging that its actions violated the medical staff bylaws. The jury found that Lawnwood had breached the bylaws and awarded Dr. Sadow over $1.5 million. The breach of contract claim is not at issue in this Court.

Instead, this petition concerns a defamation claim that was belatedly tacked on to the lawsuit.

While Dr. Sadow's suit was pending, Lawnwood CFO Robert Dunwoody told one new staff member, Dr. Raul Pinon, that Pinon should not refer patients to Dr. Sadow. Dunwoody explained that Dr. Sadow was suing the hospital and stated that he "is not a good doctor," he "has had multiple lawsuits filed against him," and "I would not send my dog to him for surgery." App., *infra*, 15a. Nevertheless, Dr. Pinon did establish a relationship with Dr. Sadow and referred at least one patient to him. Dr. Sadow learned of Dunwoody's comments some seven or eight months after they were made, and one year after learning of them he added claim for defamation to his suit.

B. At trial, the jury awards compensatory damages of $0 but punitive damages of $5 million for slander.

Dr. Sadow's claims for breach of contract and defamation proceeded to trial. With respect to defamation, Dr. Sadow argued that Dunwoody's statements to Dr. Pinon constituted slander per se, but he stipulated that the statements did not cause him any economic damages in the form of lost business. Instead, he sought only non-economic damages for injury to his reputation and mental anguish, as well as punitive damages.

At the end of the first phase of the trial, the jury found that Lawnwood had slandered Dr. Sadow but awarded him $0 in damages for injury to reputation and mental anguish. App., *infra*, 64a. The jury was told that it could award nominal damages "to vindicate a right where a wrong is established but no damage is proved," but again it awarded $0. *Id.* at 59a, 64a. The jury did find that punitive damages were warranted, however, on the ground that Lawnwood's "primary purpose in making the state-

ment was to indulge ill will, hostility, and an intent to harm Dr. Sadow," and that its "intentional misconduct" was "a substantial cause of loss, injury, or damage to Dr. Sadow." *Id.* at 60a.

As the court of appeal observed, "[t]he evidence in the second phase * * * was devoted almost exclusively to [Lawnwood's] financial condition." App., *infra*, at 18a. Dr. Sadow's financial expert testified that Lawnwood's net worth was $100 million and that "punitive damages from $30-38 million would not financially destroy the hospital." *Id.* at 19a.

In closing, Dr. Sadow's counsel suggested a punitive award of $10 million and urged the jury to "grant an award of punitive damages that will punish the hospital in light of its financial condition." Tr. 42:5608-09; see also *id.* at 5638-39 ("it's clear this is a hospital that operates at a high profit margin with high net worth, and a punishment needs to get their attention by being in a sufficient amount to hurt them"). He also sought to remove Florida's cap on punitive damages by asserting that Lawnwood "had a specific intent to harm Dr. Sadow" and its conduct "did in fact harm" him. App., *infra*, 67a. Dr. Sadow's counsel argued repeatedly that the jury should find intent and harm because it had already "made that finding in the prior part of [the] case" when it determined that punitive damages were warranted. Tr. 42:5603; see also *id.* at 5607, 5628-30, 5632.

At the end of the second phase, the jury was instructed to consider "the nature, extent and degree of the misconduct" and Lawnwood's "financial resources" in determining the amount of punitive damages. App., *infra*, 66a-67a. It awarded Dr. Sadow $5 million in punitive damages and found that Lawnwood had a specific intent to, and did, harm Dr. Sa-

dow. *Id.* at 68a. But the jury answered "no" when asked whether "the wrongful conduct of Lawnwood [was] motivated solely by unreasonable financial gain" and whether "the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, [was] actually known by Lawnwood." *Ibid.*

In support of its motion for remittitur, Lawnwood argued "that the $5 million award violates due process of law under the Fifth and Fourteenth Amendments to the United States Constitution" as interpreted in *BMW* and *State Farm*. Def.'s Mem. of Law in Supp. of Post-Trial Mots. 14. The trial court denied Lawnwood's motion, concluding that the punitive award "is not excessive." Order Denying Def.'s Mots. 7.

C. The court of appeal affirms the punitive damages by expressly rejecting this Court's guidepost analysis.

On appeal, Lawnwood again argued that "[t]he jury's punitive damages award is constitutionally excessive." Appellant's Br. 29. In particular, Lawnwood relied on this Court's decisions in *BMW* and *State Farm*, which require courts reviewing such a challenge to apply three guideposts. Lawnwood argued that the $5 million punitive award is excessive under the guideposts because: (1) the reprehensibility of its conduct was not high under the five factors discussed in *State Farm*; (2) Dr. Sadow's compensatory damages are $0, so the ratio between punitive and compensatory damages cannot even be calculated; and (3) the comparable legislative penalty for libel under Florida law is only $1,000 under Fla. Stat. §§ 775.083(1)(d) and 836.01. See Appellant's Br. 29-40.

The Florida Court of Appeal affirmed the punitive award. It expressly refused to apply the three guideposts of *BMW* and *State Farm*, reasoning that this case was instead governed by the earlier plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). App., *infra*, 27a-32a. In the court's view, *BMW* and *State Farm* are limited to "minor economic injuries" resulting from "modestly reprehensible business or commercial trade practices," *id.* at 32a, 41a, while *TXO* "supports considerable punishment without proportionality for conduct willfully and maliciously harming the plaintiff." *Id.* at 30a. The court thus rejected the ratio guidepost, holding that "the applicable rule of decision for this case is really from *TXO*: extraordinary wrongdoing justifies extraordinary civil punishment without limiting ratios." *Id.* at 46a. The court also declined to apply the five *State Farm* factors that define the reprehensibility guidepost, concluding that they were meant for cases in which "the harm was only economic." *Id.* at 44a n.30. The court did not even mention the comparable penalties guidepost.

Instead of performing this federal constitutional analysis, the court focused on Florida law, observing that Florida treats Lawnwood's conduct as highly reprehensible. App., *infra*, 31a-41a. The court held that the statutory exception to Florida's punitive damages cap gives defendants who commit intentional harm "clear warning" that "they can lawfully be punished to the extent of their personal ability to pay." *Id.* at 32a. It reasoned that this statute "allowing punitive damages without proportionality for intentional, malicious harm satisfies any *BMW* and *State Farm* concern for fair notice. The Due Process Clause is thus satisfied by this statute." *Ibid.*. The court also pointed to Florida defamation law, noting

that nominal damages are conclusively presumed to result from defamation per se. *Id.* at 36a. Moreover, "liability alone for intentionally malicious defamation per se will support substantial punishment in punitive damages" under Florida law, even without any finding of compensatory damages. *Id.* at 38a. The court believed that this treatment satisfied any federal constitutional concerns.

Finally, the court redefined the "proportionality" concern of *BMW* and *State Farm* to focus not on the relationship between the punitive award and the plaintiff's harm (as the ratio guidepost does), but on the relationship between the punitive award and the defendant's wealth. App., *infra*, 47a-49a. It observed that "[a] fine of $5,000,000 is * * * only 5% of [Lawnwood's] net worth," which "might rationally be thought by some as inadequate for a malicious defamer of such resources." *Id.* at 48a. The court then held that "[w]hen the tortfeasor has a $100,000,000 pile of unencumbered wealth, nothing in federal or Florida law suggests that 5% of that pile is arbitrary or excessive for maliciously and intentionally slandering a respected surgeon to destroy his professional reputation." *Id.* at 48a-49a. In the court's view, "[t]hat is the true application of federal proportionality in this punitive damages case." *Id.* at 49a. The court concluded "that the jury's verdict was not disproportionate under federal law in the intended sense." *Ibid.*

D. The court of appeal certifies the "great public importance" of its decision, but the Florida Supreme Court denies review.

At the end of its opinion, the court of appeal recognized the "great public importance" of properly applying *TXO*, *BMW*, and *State Farm* in reviewing punitive awards for intentionally harmful conduct such as defamation per se. App., *infra*, 51a. Accordingly, it certified to the Florida Supreme Court the question whether the $5 million award of punitive damages was unconstitutionally excessive. *Ibid.* The supreme court declined to review the question, however. *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

Courts must independently review punitive damages awards to ensure that they are not excessive in violation of the Due Process Clause of the Fourteenth Amendment. State exceptions to statutory punitive damages caps cannot supplant the standards mandated by this Court for this independent constitutional review. In this case, the Florida court substituted Florida's standards of intentional harm and presumed damages in place of this Court's constitutional standards of due process. When, as here, this Court's due process guideposts are not employed, the defendant's wealth becomes the only objective guidepost for awarding punitive damages, and constitutionally impermissible punitive awards are inevitable.

I. THIS CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). That special remedy is warranted here to address the Florida Court of Appeal's significant misapplication of this Court's punitive damages jurisprudence. Relying heavily on state law, the Florida court deliberately refused to apply the three constitutional guideposts that *BMW* and *State Farm* require all courts to use in reviewing punitive damages. See Part II, *infra*. As another recent case confirms, Florida courts limit "the full three-part analysis set forth in [*State Farm* and *BMW*]" to cases involving "purely economic consequences of only slight individual financial harm." *James Crystal Licenses, LLC v. Infinity Radio Inc.*, __ So.3d __, 2010 WL 1979139, at *6 (Fla. Ct. App. May 19, 2010); *see id.* at *8 (noting that this decision "abandoned the proportionality analysis"). Florida has thus exempted many cases from the due process analysis this Court mandated to ensure that civil punishment is not arbitrary or unreasonable.

Summary reversal would allow the Court to clarify that state law is not an escape hatch from the constitutional standards governing review of punitive damages while also preventing injustice in this case and conserving the Court's scarce resources. This remedy is especially necessary because the issues on which the Florida court parts company from this Court are recurring ones that go to the heart of due process and will change the outcomes in many cases. Under the Florida court's decision, the guideposts will no longer constrain punitive damage

awards in cases involving intentional harm, or cases involving conduct that state law identifies as especially reprehensible or exempts from a statutory punitive damages cap. See Part II.A., *infra*. In those categories of cases, which arise frequently, punitive damages will be limited only by the defendant's "personal ability to pay." App., *infra*, 32a.

In addition, under the Florida court's decision, the standard for finding punitive damages excessive under the Federal Constitution will vary based on state law as well as each court's subjective comparison of the defendant's wealth to its conduct. Such a standard will inevitably lead to arbitrary variations in punitive awards for similar conduct: the very evil this Court intended to curtail by requiring "[e]xacting appellate review" of the three guideposts. *State Farm*, 538 U.S. at 419; see also *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2627 (2008) (discussing the unfairness of unpredictable punitive awards); *BMW*, 517 U.S. at 587 (Breyer, J., concurring).

This Court has mandated a "thorough, independent" *de novo* appellate review of the guideposts it announced for use in every punitive damages case. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436-37, 441 (2001); *Exxon Shipping*, 128 S.Ct. at 2626. The Court should take this opportunity to make clear that States cannot opt out of the guideposts, which are necessary to assure the "uniform general treatment of similarly situated persons that is the essence of the law itself." *Cooper Indus.*, 532 U.S. at 436.

II. THE DECISION BELOW DEFIES THE STANDARDS THIS COURT MANDATED TO ENSURE THAT PUNITIVE DAMAGES AWARDS DO NOT VIOLATE DUE PROCESS.

A. The Florida Court Refused To Apply The Guideposts.

In *BMW* and *State Farm*, this Court "announced due process standards that *every award* [of punitive damages] must pass." *Exxon Shipping*, 128 S.Ct. at 2626 (emphasis added). Those cases

> instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm, 538 U.S. at 418. In addition, they "instructed courts to determine the reprehensibility of a [defendant's conduct] by considering" five factors, namely, whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 419.

This Court has "*mandated* appellate courts" to review *de novo* the application of these guideposts to the jury's award. *Id.* at 418 (emphasis added). It is this "[e]xacting appellate review [that] ensures that an award of punitive damages is based on an 'application of law, rather than a decisionmaker's caprice.'" *Ibid.* (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

The Florida court did not follow these instructions. It expressly declined to apply the five reprehensibility factors and the ratio guidepost, and it simply ignored the comparable penalties guidepost. App., *infra*, 30a-32a, 44a n.30, 46a. Thus, its decision directly contradicts the holdings of this Court quoted above, which mandate that every appellate court conduct an exacting review of the three *BMW* guideposts.

The specific reasons that the Florida court gave for insulating a wide swath of punitive damages awards from exacting due process scrutiny also conflict with this Court's decisions. The Florida court concluded that the constitutional constraints recognized in *BMW* and *State Farm* are inapplicable to punitive awards for intentional harm and to awards for conduct that state law marks for substantial punitive damages. See p. 8, *supra*. It also relied on Lawnwood's net worth to hold that the award here satisfied the constitutional requirement of proportionality. App., *infra*, 47a-49a. None of these rationales withstands scrutiny.

1. Intentional harm cases are not exempt from guidepost review. The Florida court began its due process analysis by asking "whether this case

is governed by *State Farm* and *BMW* or perhaps instead by *TXO* where no ratio was used." App., *infra*, 27a. It observed that *TXO* involved "intentional wrongdoing," *ibid.*, and that Justice Kennedy emphasized in his concurrence that "'TXO acted with malice.'" *Id.* at 29a (quoting *TXO*, 509 U.S. at 468 (Kennedy, J., concurring)). In contrast, the court viewed "the *State Farm* and *BMW* ratios" as "intended mainly for modestly reprehensible business or commercial trade practices causing individual damages limited in size, extent, or amount." *Id.* at 32a. The court also held that the five reprehensibility factors that *State Farm* instructed courts to consider are limited to cases in which "the harm was only economic." *Id.* at 44a n.30.

Applying this view, the court concluded that the "minor economic injuries in [*BMW* and *State Farm*] pale into insignificance next to the calumnies proven here," where the jury found that Lawnwood specifically intended to harm Dr. Sadow's reputation. App., *infra*, 41a. "Hence the applicable rule of decision in this case is really from *TXO*: extraordinary wrongdoing justifies extraordinary civil punishment *without limiting ratios*." *Id.* at 46a (emphasis added). The court thus declined to apply the ratio guidepost and reprehensibility factors.

The Florida court's analysis is flatly contrary to this Court's decisions in *BMW* and *State Farm*. With respect to ratio, *BMW* incorporated *TXO* into its analysis, recognizing that in *TXO* "the relevant ratio was not more than 10 to 1." *BMW*, 517 U.S. at 581. In *State Farm*, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. Thus, *TXO*

does not support punitive damages for intentional harm "without limiting ratios," as the Florida court claims. App., *infra*, 46a. This Court recently confirmed that the ratio between punitive and compensatory damages is an "indisputable" "central feature in our due process analysis"—a feature that "every award must pass." *Exxon Shipping*, 128 S.Ct. at 2626, 2629.

As to reprehensibility, *BMW* cited *TXO* in recognizing intentional injury as one of the factors bearing on reprehensibility. *BMW*, 517 U.S. at 576. Yet the Florida court declared that reprehensibility exists as a matter of law based solely on intent to harm a person's reputation, App., *infra*, 31a-41a, disregarding the other four factors that this Court has "instructed courts to * * * conside[r]" in determining whether the defendant's conduct is sufficiently reprehensible to justify the amount of punitive damages awarded. *State Farm*, 538 U.S. at 419. Excluding those other factors is contrary to this Court's admonition that the existence of only one factor, such as malicious intent, "may not be sufficient to sustain a punitive damages award." *Ibid.*

The linchpin of the Florida court's conclusion that *TXO* exempts cases of intentional harm from the guideposts is its view that *BMW* and *State Farm* are limited to "modestly reprehensible business and commercial trade practices" that cause only limited economic harm. App., *infra*, 32a. To the contrary, one of the reprehensibility factors is whether "the harm caused was physical as opposed to economic," *State Farm*, 538 U.S. at 419, which confirms that the factors also apply to non-economic harm. Thus, review of all five factors is not optional.

The facts of *State Farm* also belie the Florida court's characterization. The jury found State Farm liable not only for bad faith and fraud but also intentional infliction of emotional distress, which by definition involves intentional, non-economic harm. *State Farm*, 538 U.S. at 425-26. The Utah Supreme Court held that awards of $1 million in non-economic damages to compensate the Campbells for this intentional harm were not excessive. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1166 (Utah 2001), rev'd on other grounds, 538 U.S. 408 (2003). This Court's decision to apply the *BMW* guideposts in reviewing the constitutionality of the punitive damages award in *State Farm* thus confirms that those guideposts apply equally to cases involving intentional harm.

The Florida court also departed from this Court's precedent by removing actual harm from the reprehensibility equation. Four of the five factors, including intentional malice, require harm to the plaintiff or indifference to the health or safety of others. *State Farm*, 538 U.S. at 419. Absent actual harm, there can be no reprehensibility. *Id.* at 422-23, 426.

Actual harm measured by damages is the objective polestar that guides this Court's entire substantive due process review. It is an integral part of both the proportionality and the reprehensibility guideposts. It makes the amount of potential punitive damages predictable, providing notice of the severity of the offense. *BMW*, 517 U.S. at 574. Thus, in *State Farm*, this Court repeatedly emphasized that to be punishable, "conduct must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. Again, a "defendant should be punished for the conduct that harmed the plaintiff, not for being an un-

savory individual or business." *Id.* at 423. In the absence of comparable civil penalties, actual damages are the only objective reference point with the capacity to transform punitive damages from inherently arbitrary to reasonably predictable. *See Exxon Shipping*, 128 S.Ct. at 2625-26, 2629. The Florida court's decision to exclude actual harm from its analysis thus cannot be squared with this Court's jurisprudence.

In sum, the plurality decision in *TXO* cannot bear the weight that the Florida court placed on it. When *TXO* was decided, this Court had not yet developed the contours of due process review of punitive damages awards, as the divided opinion in that case shows. Yet the concerns voiced in the plurality opinion and Justice Kennedy's concurrence, such as Justice Kennedy's focus on whether the defendant's conduct was malicious, were later incorporated into the three-guidepost analysis used by a majority of this Court in *BMW* and *State Farm*.

The Court should take this opportunity to make clear that *TXO* does not authorize lower courts to short-circuit the guidepost analysis and focus solely on reprehensibility as measured by intent to harm. That approach, which the Florida court took here, impermissibly allows a court "to rel[y] upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution." *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring).

2. State law does not alter the due process analysis. The Florida court also relied on state law to create an exception to the three-guidepost constitutional analysis mandated by this Court. It even believed that this Court's jurisprudence allows such

state-law exceptions to federal due process review, claiming that this Court's opinions in *BMW* and *State Farm* authorize States to "specify some unusually reprehensible conduct for punitive damages that need not be proportioned to compensatory losses." App., *infra*, 27a. Based on this mistaken premise, the court concluded that "[t]he Due Process Clause is * * * satisfied" by the Florida statute removing the cap on punitive damages for intentional harm. *Id.* at 32a. The court also "declin[ed] to apply the *State Farm* and *BMW* ratios" on the ground that Florida law treats intentionally malicious defamation as sufficiently reprehensible that "liability alone * * * will support substantial punishment in punitive damages," even without any finding of compensatory damages. *Id.* at 32a, 38a.

State Farm unequivocally rejects such reliance on state law and policy as a substitute for constitutional scrutiny of punitive damages awards. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in [*BMW*]." *State Farm*, 538 U.S. at 427; *see also id.* at 416-17. Whether state law "authorizes the jury to consider and assess punitive damages without any finding of an amount of compensatory damages" (App., *infra*, 39a-40a) is simply a different question from whether the resulting punitive damages award is excessive as a constitutional matter under the *BMW* guideposts.

Furthermore, one of the principles set forth in *BMW* is that every defendant must receive "fair notice not only of the conduct that will subject him to punishment, but also of the *severity* of the penalty that a State may impose." *BMW*, 517 U.S. at 574

(emphasis added). The required notice of severity is not provided by a statute that authorizes uncapped punitive damages for intentional or malicious torts "to the extent of [defendants'] personal ability to pay." App., *infra*, 32a. "The Due Process Clause does not permit a State to classify arbitrariness as a virtue." *State Farm*, 538 U.S. at 417-18 (alteration and internal quotation marks omitted).

Especially troubling is the Florida court's use of state law to reject the ratio guidepost. In its view, "[d]eclining to apply the *State Farm* and *BMW* ratios" is proper because the state cap statute "eliminates proportional ratios in cases of unusual reprehensibility." App., *infra*, 32a. To the contrary, this Court has consistently recognized that *BMW*'s principles must be implemented with care to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of general damages recovered." *State Farm*, 538 U.S. at 426.

The Florida court's holding is a classic example of violating due process by asking the wrong questions. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). There can be no check on the inherent arbitrariness of punitive takings absent a consistent gauge by which all such takings are measured. And this Court has consistently held that the gauge is harm actually or potentially caused to the plaintiff. Whether a defendant's conduct falls within an exception to a state punitive damages cap statute is completely irrelevant to that gauge. Nothing in this Court's jurisprudence justifies abandoning the objectives of reasonable and proportionate punitive damages or any of the three guideposts this Court announced to assure they are achieved.

Finally, the Florida court's refusal to review punitive damage awards using this Court's three guideposts denies defendants procedural due process. Indeed, the Florida court's use of state law to override the constitutional guideposts raises the same presumption of a due process violation that Oregon's "abrogation of well-established common-law protection against arbitrary deprivations of property" raised in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court should grant certiorari to make clear that state law is no substitute for the exacting review of constitutional guideposts mandated by *BMW* and *State Farm*.

3. A defendant's wealth does not determine the proportionality of a punitive award. The Florida decision demonstrates why a defendant's wealth cannot make up for the failure to consider key due process guideposts. See *State Farm*, 538 U.S. at 428. Wealth necessarily injects arbitrariness and bias into a punitive damages award. *Ibid.*; *Oberg*, 512 U.S. at 432. Yet the Florida court substituted Lawnwood's wealth for the objective due process guideposts of proportionality to actual harm (*i.e.*, ratio) and comparable penalties.

With reprehensibility fixed by the evidence offered at the liability phase of the trial, the punitive damages phase "was devoted almost exclusively to the financial condition" of Lawnwood. App., *infra*, 18a. That evidence revealed a net worth "exceeding $100 million," *id.* at 18a-19a, though given the substantial value tied up in the hospital's building only about $30 to $38 million could be accessed without financially destroying its ability to operate and care for patients. *Ibid.*; Tr. 42:5598-99, 5608, 5618. Dr. Sadow's counsel urged the jury to make a sizable

award that would punish Lawnwood in light of its financial condition. See p. 6, supra.

On appeal, the Florida court relied on Lawnwood's wealth as its sole objective reason for upholding the punitive award. Given the jury's refusal to find that Dr. Sadow suffered compensable harm, the court focused instead on Lawnwood's financial condition, which it mischaracterized as "a $100,000,000 pile of unencumbered wealth." App., *infra*, 48a. Comparing that wealth to the punitive award, the court concluded that the "Due Process Clause's concern for excessiveness" was satisfied because "nothing in federal or Florida law suggests that 5% of that pile is arbitrary or excessive" punishment for Lawnwood's conduct. *Id.* at 48a-49a. According to the court, "[t]hat is the true application of federal proportionality in this punitive damages case." *Id.* at 49a.

Under the Florida court's analysis, no amount of punitive damages up to a defendant's net worth can be unconstitutionally arbitrary or excessive because Florida's punitive damages cap exception gives "clear warning that for intentional and malicious harm [defendants] can be punished to the extent of their personal ability to pay." App., *infra*, 32a. This use of wealth to review the amount of punitive damages awarded resulted in an unreasonable, grossly excessive award that constituted an arbitrary taking of Lawnwood's property.

This Court has repudiated the use of a defendant's wealth to justify an otherwise unconstitutional punitive damages award. *State Farm*, 538 U.S. at 427. When, as here, the defendant's wealth "had little [or nothing] to do with the actual harm sustained" by the plaintiff, it "cannot make up for the failure of other factors" to support the award. *Id.* at

428. In the absence of actual harm sustained by the plaintiff, evidence of the defendant's wealth "provid[ed] an open-ended basis for inflating" the maximum permissible award. *Id.* Here, wealth provided literally the only objective evidence supporting the amount of the award, and the only constraint on that amount. When used in this way, wealth precludes the "reasonableness and proportionality" required to satisfy the Due Process Clause. *Ibid.*

B. The Guideposts Show That This $5 Million Punitive Award Is Excessive.

The Florida court's failure to follow this Court's mandatory instructions for constitutional review of punitive damages changed the outcome of this case. Applying the three guideposts to these facts demonstrates that the $5 million punitive damages award is an arbitrary and excessive deprivation of property in violation of the Due Process Clause.

1. Reprehensibility. Three of the five factors that *State Farm* instructed courts to use in determining reprehensibility (538 U.S. at 418-19) indisputably show that Lawnwood's conduct was not highly blameworthy: the harm caused was not physical; Lawnwood did not disregard the health or safety of others; and there is no evidence that Dr. Sadow was financially vulnerable. There can be no dispute about these factors.

Regarding the factor whether any harm was the result of intentional malice, the jury did find that Lawnwood intended to harm Dr. Sadow. As Dr. Sadow's counsel emphasized, however, the jury had to make this finding in order to award any punitive damages at all for defamation. See pp. 5-6, *supra.* Thus, the finding of intent to harm cannot provide a

basis for concluding that the conduct in this case was relatively more reprehensible than that in other defamation cases where punitive damages were awarded. In fact, a review of punitive awards in other defamation cases shows that awards well below $5 million are the norm for conduct much worse than saying bad things about a doctor to one other doctor. *See* Part III.B., *infra*. Compared to these cases, as well as cases in which a corporation disregards safety or causes physical harm, Lawnwood's conduct can hardly be called "the very worst institutional wrongdoing conceivable." App., *infra*, 45a.

Turning to the last factor, and putting aside the Florida court's hyperbole, the evidence showed that Lawnwood's defamation of Dr. Sadow was an isolated incident. Dr. Pinon testified that Dunwoody, Lawnwood's CFO, told him that Dr. Sadow was a bad doctor. There is no evidence that Dunwoody made similar comments about Dr. Sadow to any other doctors, much less that Lawnwood "set out to destroy Dr. Sadow's career in the community" as the Florida court asserted. App., *infra*, 45a. While there was evidence that Dunwoody made similar comments *about other doctors* to Dr. Pinon, those comments are not relevant to the reprehensibility analysis because there was no evidence they were slanderous as to the other doctors and no evidence that those nonparty doctors suffered any "actual harm." *Philip Morris*, 549 U.S. at 355. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims * * * under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423.

Other considerations mentioned by this Court also lessen the reprehensibility of Lawnwood's con-

duct. Dunwoody's statements were profitless to Lawnwood, and Dr. Pinon disregarded those statements and referred at least one patient to Dr. Sadow. Thus, Dr. Sadow stipulated that there was no economic "harm caused" by the statements, and the jury found no non-economic harm. *State Farm*, 538 U.S. at 419. In addition, there is no evidence that Dunwoody's defamation of Dr. Sadow "persisted" after Lawnwood learned of it, much less after it was "adjudged unlawful." *BMW*, 517 U.S. at 579.

Finally, the jury's $5 million award cannot be justified based on the Florida court's view that punishment "with a strong corrective impact on the defamer" was warranted. App., *infra*, 46a. As this Court recognized in *BMW*, assertions that punishment is "necessary to deter future misconduct" require consideration of "whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. Here, the evidence showed that aside from Dr. Sadow, no one had ever made a claim of defamation by Lawnwood. Tr. 42:5568, 5570-71. Because Lawnwood did not have "a history of non-compliance" with defamation laws, "there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" in the future. *BMW*, 517 U.S. at 585. To the contrary, Lawnwood created a defamation education program for its managers after the jury's verdict in the liability phase of this case. Tr. 42:5569.

In sum, as this Court observed in *State Farm*, only "one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." 538 U.S. at 419. Here, Dr. Sadow proved only the intentional harm factor, and as explained above even that factor does not

suggest that Lawnwood's conduct is more reprehensible than the conduct of other defendants punished for defamation. Accordingly, the reprehensibility guidepost indicates that $5 million is excessive punishment.

2. Ratio. The second guidepost also points to excessiveness because the ratio "between the actual or potential harm suffered by the plaintiff and the punitive damages award" of $5 million is infinite. *State Farm*, 538 U.S. at 418. Dr. Sadow stipulated that he suffered no economic damages, and he "recovered" $0 in non-economic "compensatory damages." *Id.* at 425-26. Moreover, he offered no evidence of any potential harm from Lawnwood's conduct. Thus, the Florida court erred in speculating that Dunwoody's statements to Dr. Pinon were "likely to have significant and long-lasting public and professional consequences." App., *infra*, 45a; see *BMW*, 517 U.S. at 582 (noting the lack of evidence of "potential harm"); *TXO*, 509 U.S. at 468 (Kennedy, J., concurring) (concluding that because "the record in this case does not contain evidence * * * regarding the potential harm from TXO's conduct," such harm cannot be used to sustain the punitive award).

Even if nominal damages of $1 were legally presumed under state law, as the Florida court held they should be (App., *infra*, 50a), the ratio would be 5,000,000:1. This astonishing ratio is certainly far more "breathtaking" than the 500:1 ratio found unconstitutional in *BMW* or the 145:1 ratio struck down in *State Farm*. *BMW*, 517 U.S. at 583; *see also State Farm*, 538 U.S. at 424-25. As this Court has said, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a sig-

nificant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Of course, the Court has also noted that "ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *State Farm*, 538 U.S. at 425 (internal quotation marks omitted). That possible exception is inapplicable here, however, because the reprehensibility discussion above demonstrates that Lawnwood's conduct was not particularly egregious.[1] Moreover, even if the exception were applicable, there is nothing about Lawnwood's conduct that could possibly justify what may well be the largest amount of punitive damages ever upheld by an appellate court in a defamation case—or indeed in any case where the plaintiff was awarded nominal or small compensatory damages. See Part III.B., *infra*. As this Court pointed out in *Exxon Shipping*, many states apply a 3:1 limit—or alternatively a hard-dollar cap of far less than $5 million—even in cases involving malicious behavior. 128 S.Ct. at 2623, 2631.

3. Comparable penalties. "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 517 U.S. at 583. As this Court has explained,

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[1] The possible exception that "the monetary value of noneconomic harm might have been difficult to determine," *State Farm*, 538 U.S. at 425, also does not apply here because the jury found that Dr. Sadow suffered no non-economic damages. App., *infra*, 64a.

"a reviewing court * * * should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Ibid.* (internal quotation marks omitted). Here, the Florida Legislature has authorized a maximum criminal penalty of $1,000 for libel, which is the written equivalent of slander. See Fla. Stat. §§ 775.083(1)(d), 836.01. The Florida court erred by ignoring this objective benchmark, which is particularly useful for preventing excessive punishment in cases where only nominal or small compensatory damages are awarded.

* * *

For these reasons, a $5 million award of punitive damages for slander that was not highly reprehensible, and caused no damages, is unconstitutionally excessive. This Court should grant certiorari and hold, either summarily or after full briefing, that the punitive award against Lawnwood violates the Due Process Clause.

III. THE FLORIDA COURT'S REASONS FOR DEPARTING FROM THE GUIDEPOSTS CONFLICT WITH DECISIONS OF OTHER COURTS.

This Court has directed lower courts to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of general damages recovered." *State Farm,* 538 U.S. at 426. As explained in Part II.A., the Florida court sidestepped this directive by exempting large categories of cases from the guideposts. Lawnwood submits that the Florida court's refusal to apply the guideposts is flatly con-

trary to this Court's punitive damages jurisprudence and warrants summary reversal. Even if this Court disagrees, however, the Florida court's decision at least conflicts with decisions of federal and state courts that apply the full guidepost analysis to these categories of cases. Because such cases arise frequently, this Court should resolve the conflict and make clear that the guideposts apply to all punitive awards.

The Florida court also held that the proportionality inquiry should focus not on the plaintiff's harm but on the defendant's net worth. App., *infra*, 46a-49a. As explained below, this holding deepens a disagreement among the lower courts over how to determine if punishment is unreasonable or disproportionate in cases where the plaintiff receives only nominal or small compensatory damages. To Lawnwood's knowledge, no court deciding such a case has upheld a punitive award approaching the $5 million award affirmed by the Florida court here. The Court should review this important and recurring question.

A. Other Courts Apply The Guideposts To Cases Like This One.

One of the Florida court's principal justifications for permitting "considerable punishment without proportionality" is that "reprehensibility is at its highest" in defamation cases because state law affords "singular protection" to "personal reputation." App., *infra*, 36a, 41a. Given that Florida law permits a jury to award punitive damages for intentionally harmful defamation without finding compensatory damages, the court "[d]ecline[d] to apply the *State Farm* and *BMW* ratios." *Id.* at 32a. It also declined to apply the five reprehensibility factors from those cases, reasoning that the economic injuries there

were "almost trivial" compared to reputational injuries. *Id.* at 41a.

In contrast, other courts around the country apply all of the *BMW* guideposts to defamation cases. *E.g., Stamathis v. Flying J, Inc.*, 389 F.3d 429, 436, 443-44 (4th Cir. 2004); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 452, 467-69 (3d Cir. 1999); see also *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 647-54 (Ark. Ct. App. 2005); *Cent. Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 277, 284-85 (Alaska 2002); *Coachmen Indus., Inc. v. Dunn*, 719 N.E.2d 1271, 1274, 1278-79 (Ind. Ct. App. 1999).

In rejecting the ratio guidepost, the Florida court also relied heavily on the exception to the state punitive damages cap statute that "eliminates mathematical proportionality" for intentional harm, concluding that "[t]he Due Process Clause is * * * satisfied by this statute." App., *infra*, 31a-32a. The Texas Supreme Court has held, however, that a state cap statute is no substitute for the guidepost analysis of whether a punitive award is unconstitutionally excessive. *Tony Gullo Moters I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). The court reasoned that "while 'state law governs the amount properly awarded as punitive damages,' that amount is still 'subject to an ultimate federal constitutional check for exorbitancy.'" *Id.* at 307 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996)). Applying the guideposts, the court concluded that although the statutory cap was $200,000, a punitive award of $125,000 was excessive where the compensatory damages were approximately $29,000. *Id.* at 308-10.

Finally, the Florida court held that "*TXO* supports considerable punishment without proportionality" for intentional harm. App., *infra*, 30a. Lawnwood is aware of no other case holding that *TXO* exempts punitive awards for intentional harm from the ratio guidepost altogether. To the contrary, courts have consistently applied that guidepost to cases involving intentional harm. *E.g.*, *Int'l Union of Operating Eng'rs Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 320 (Ill. 2006); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005).

As discussed in Part I above, these disagreements are important because cases involving intentional harm and exceptions to state punitive damage caps arise frequently. Accordingly, the Court should grant certiorari to resolve them, either summarily or after full briefing.

B. Courts Disagree About The Constitutional Limits On Punitive Awards When Compensatory Damages Are Not Substantial.

This Court has not yet reviewed any punitive damages case in which the compensatory damages were lower than the $4,000 awarded in *BMW*. In both *BMW* and *State Farm*, however, it observed that "ratios greater than those we have previously upheld may comport with due process" when "'a particularly egregious act has resulted in only a small amount of economic damages,'" or when the injury is hard to detect or to value. *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582). The state and lower federal courts review many punitive damages cases involving nominal or small compensatory damages, and they are divided over how to apply this

Court's observation while also ensuring that the punitive awards are "reasonable and proportionate." *Id.* at 426; see also *BMW*, 517 U.S. at 583 (noting that "'[a] general concer[n] of reasonableness'" continues to apply to such cases). This Court's guidance is needed.

When nominal or small compensatory damages are awarded, courts reviewing substantial punitive awards have taken different approaches. Some courts treat this Court's above-quoted observation as an absolute exception to the ratio guidepost, finding its constraints inapplicable if the defendant's conduct is particularly egregious or the injury is difficult to value.[2] If the defendant's conduct is not particularly egregious, courts have recognized that the ratio guidepost, while not dispositive, cuts against the constitutionality of the punitive award.[3]

Most courts have taken a middle position, however. While acknowledging that ratio is not the best tool for measuring excessiveness when actual damages are small or nominal, they recognize this Court's underlying concerns of reasonableness and proportionality, and they address those concerns by considering the size of punitive awards in similar

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[2] *E.g.*, *Kemp v. AT&T Co.*, 393 F.3d 1354, 1363-64 (11th Cir. 2004); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003); see also *Roberie v. VonBokern*, No. 2004-SC-250, 2006 WL 2454647, at *8 (Ky. Aug. 24, 2006).

[3] *E.g.*, *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1122 (9th Cir. 2008); *Simon*, 113 P.3d at 76-78.

cases.[4] A few courts consider the defendant's wealth in addition to similar cases.[5]

The Florida court's decision conflicts with this middle position. The court considered the proportionality concern by focusing solely on the defendant's wealth. App., *infra*, 49a. Although Lawnwood's brief cited cases showing that constitutional punitive awards are far below $5 million when actual damages are small or nominal, the Florida court did not address those cases. Instead, it brushed the issue aside by citing three reports of substantial Florida verdicts for defamation in the health care setting. *Id.* at 48 n.37. Tellingly, however, none of those reports states that the damages included any punitive component at all. *Ibid.* The court cited only one (pre-*BMW*) case addressing an award of punitive damages for defamation, and the award upheld there was only $100,000—not $700,000 as stated by the Florida court. See *Zambrano v. Devanesan*, 484 So.2d 603, 607-08 (Fla. Ct. App. 1986); *cf.* App., *infra*, 48a n.37. That is certainly not a "comparable

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[4] *E.g.*, *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 876-77 (8th Cir. 2008); *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 153-54 (4th Cir. 2008); *Lowe Excavating Co.*, 870 N.E.2d at 320-23; *Romanski v. Detroit Ent'mt, L.L.C.*, 428 F.3d 629, 645-47 (6th Cir. 2005); *Williams v. Kaufman County*, 352 F.3d 994, 1016 & n.78 (5th Cir. 2003); *Lee v. Edwards*, 101 F.3d 805, 810-11 (2d Cir. 1996); *see also Diversified Water Diversion, Inc. v. Standard Water Control Sys., Inc.*, No. A07-1828, 2008 WL 4300258, at *6-7 (Minn. Ct. App. Sept. 23, 2008).

[5] *E.g.*, *Saunders*, 526 F.3d at 154-55; *Romanski*, 428 F.3d at 647-48.

amount[]" to the $5 million award here. App., *infra*, 48a n.37.

The Florida court's refusal to consider the size of punitive awards in similar cases thus conflicts with the decisions above. If it had examined such cases, the outcome here would surely have been different. Most of the punitive awards upheld as constitutional in defamation cases are in the $30,000 to $400,000 range;[6] the largest awards of $1 million and $3.08 million accompanied substantial actual damages that are absent here.[7] Similarly, most of the punitive

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[6] *Diversified Water Diversion*, 2008 WL 4300258, at *6-7 (upholding punitive award of $30,000 for repeatedly disparaging plaintiff to customers even after being warned to desist where actual damages were $0); *Stamathis*, 389 F.3d at 443 (upholding punitive award of $350,000 for having plaintiff arrested for larceny without probable cause where actual damages were $250,000); *Cent. Bering Sea Fishermen's Ass'n*, 54 P.3d at 275-76, 282, 284-85 (upholding punitive awards of $400,000 and $200,000 against association and president for accusing employee of stalking, threatening colleagues, and breaking into association offices in order to push her out of industry and cover up president's misappropriation where actual damages were $48,000); *Dunn*, 719 N.E.2d at 1278-79 (upholding punitive award of $200,000 for accusations of odometer tampering where actual damages were $30,000).

[7] *Superior Fed. Bank*, 219 S.W.3d at 648, 651-54 (affirming reduction of $5 million punitive award to $3.08 million where bank's use of racial insults and epithets to describe customer caused "consider-

awards upheld as constitutional in cases where only nominal or small compensatory damages were awarded are in the $5,000 to $250,000 range;[8] the largest award of $1.29 million was based on evidence of substantial potential harm that is absent here.[9]

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able economic and reputational injuries" of $175,000); *Inter Med. Supplies*, 181 F.3d at 465-69 (reducing $100 million punitive award for defamation and other claims to $1 million where actual damages on all claims were $48 million).

[8] *Mendez*, 540 F.3d at 1120-23 (affirming reduction of $250,000 punitive award for false arrest to $5,000 where nominal damages were $2); *JCB*, 539 F.3d at 874-77 (reducing punitive award of just over $1 million for trespass to just over $100,000 where nominal damages were $1); *Saunders*, 526 F.3d at 152-55 (upholding punitive award of $80,000 where statutory damages were $1,000 for violation of Fair Credit Reporting Act); *Kemp*, 393 F.3d at 1357, 1362-65 (reducing $1 million punitive award for racketeering to $250,000 where actual damages were $115.05); *Williams*, 352 F.3d at 1001, 1016 (upholding punitive award of $15,000 for unconstitutional search where nominal damages were $100); *Mathias*, 347 F.3d at 674-78 (upholding punitive award of $186,000 for negligence where actual damages were $5,000).

[9] *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 743, 746-47 (8th Cir. 2003) (upholding punitive award of $1.25 million for breach of fiduciary duty where plaintiff received only nominal damages but offered evidence that potential harm was $3.9 million).

Moreover, as discussed above, the comparable legislative penalty in Florida is only $1,000. In light of these objective benchmarks, the Court should hold that the $5 million award of punitive damages is unconstitutionally excessive and reduce the award to no more than $250,000.

CONCLUSION

The Court should summarily reverse the judgment of the Florida Court of Appeal and reduce the award of punitive damages to no more than $250,000. In the alternative, the petition for writ of certiorari should be granted and the case set for plenary review.

Respectfully submitted.

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APPENDIX A

DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

LAWNWOOD MEDICAL CENTER INC.,
Appellant,

v.

SAMUEL H. SADOW, M.D.,
Appellee.

No. 4D08-1968.

[March 24, 2010]

FARMER, J.

A surgeon with staff privileges sued a hospital for breach of contract, and later added a claim for slander per se, seeking compensatory damages for both claims, as well as punitive damages for the slander. He alleged that the hospital had breached its contract with its medical staff, the Medical Staff Bylaws, by invalidly giving another surgeon exclusive privileges for cardiovascular surgery. The exclusive grant barred him from such surgery even though he had been approved for it by the hospital's credentialing committee and medical staff leadership. The slander claim involved statements during the litigation by senior executive officers of the hospital that, among others, the doctor was not even "qualified to perform surgery on a dog."

The jury found the hospital liable on the breach of contract claim and fixed his total damages at $2,817,000, reduced to $1,517,000 because he could have mitigated his losses. In separate proceedings on the slander per se claim, the jury found Lawnwood liable for the slanders; that Lawnwood specifically intended to harm him by its per se slanderous statements; that, in fact, it had actually injured him by the statements; and that he suffered no compensatory damages from the slanders but that he was entitled to punitive damages of $5 million from the hospital. After extensive hearings, the trial court denied Lawnwood's post trial motions for directed verdict and a new trial or a remittitur of punitive damages to a reduced sum.

In the appeal of the contract claim, Lawnwood repeats its trial court argument of statutory immunity from liability to the surgeon. As to the claim of slander per se, Lawnwood presents no appellate issues regarding liability or entitlement to punitive damages. Instead it appeals solely the amount of punitive damages, confining its argument to the contention that $5,000,000 is excessive under the United States Constitution. Before addressing these two issues, we must first examine the evidence supporting the verdicts.[1]

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[1] On appellate review the verdict in Dr. Sadow's favor compels us to accept his version of disputed issues of fact. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447 (1993) (jury verdict in favor of one party makes it appropriate to accept that party's version of disputed issues of fact); *Helman v. Seaboard Coast Line R.R. Co.*, 349 So.2d 1187 (Fla. 1977) (not function of appellate court to reevaluate evidence and substitute its judgment for jury).

A. Facts

1. The Background to Breach of Contract

Dr. Sadow is a graduate of the University of Chicago Medical School. His residency was in general thoracic and cardiac surgery at the Chicago Heart and Lung Institute. That was followed by a 2-year fellowship in cardiovascular and thoracic surgery at Wayne State University in Detroit. He is board certified in cardiovascular, thoracic and vascular surgery.

He settled in south Florida in 1985, beginning his practice on the staffs at hospitals located in Palm Beach Gardens and Jupiter. Patients are typically referred to surgeons of his specialty by cardiologists and primary care physicians. Although he began doing both general thoracic and cardiac surgery, in time he concentrated on cardiovascular surgery (CVS).[2]

He entered into a partnership with a Dr. Downing. Over the years, he perceived that 60-70% of his patients came by referrals from physicians in Martin and St. Lucie counties. He thereupon opened offices in Fort Pierce and Tequesta to handle what was becoming the principal part of his practice. He also observed that a significant number of those patients were indigent, some with only Medicaid benefits.

Lawnwood is a profit seeking corporation. It is owned by Hospital Corporation of America, now

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[2] This surgery is described as "high risk" or "open heart" surgery. Typically it involves valve replacements, repairs with or without coronary bypass grafts, left ventricular aneurysm repairs, and thoracic aortic dissections and aneurysms.

known as HCA, based in Tennessee, whose stock is held by investors. The corporation's senior executive staff — Chief Executive Officer (CEO) and Chief Financial Officer (CFO) — are not elected by the medical staff but are instead appointed by corporate directors. During the time of the events involved in this lawsuit, none of these senior executives were themselves physicians.

Lawnwood is the principal hospital in St. Lucie County. Martin Memorial Hospital is the principal hospital in Martin County, located in Stuart, just south of Fort Pierce (St. Lucie County). At that time, neither Lawnwood nor Martin Memorial were authorized to offer cardiovascular surgery. Hence cardiac surgical patients in these two counties were referred by their cardiologists and primary care physicians to surgeons in Palm Beach County for the surgical procedure. In the late 1980's Dr. Sadow began seeing increasing numbers of such referrals. He undertook frequent trips to Lawnwood to examine patients and assist referring physicians in assessing their surgical needs.

In 1993 Lawnwood itself decided to seek state governmental agency approval for authority to offer CVS surgery. The hospital prepared an application to the Florida Agency for Health Care Administration for a Certificate of Need (CON) to perform CVS.

Lawnwood's application was opposed by a number of hospitals in the south Florida region, including Martin Memorial, JFK in Lake Worth, St. Mary's and Good Samaritan in West Palm Beach, Palm Beach Gardens Hospital, and a Boynton Beach hospital. The CEO of Lawnwood, Trezona, approached

Dr. Sadow to assist the institution in the effort to obtain the CON for cardiovascular surgery. At Trezona's request, Dr. Sadow worked closely with him in preparing the application to the state agency, supplying relevant information and strategy for making the application meritorious.

In its application, Lawnwood explicitly relied on Dr. Sadow's credentials and experience as a board certified cardiovascular surgeon and his written commitment to practice CVS at Lawnwood when the planned new facility for that purpose finally opened. Accordingly Dr. Sadow planned relocating his practice to the area of Lawnwood, meanwhile ending his partnership with Dr. Downing by mutual agreement.

He wrote letters on Lawnwood's behalf. He traveled to testify in favor of the CON application. He spoke to various people and groups to generate support for the CON's approval. He called attention to the fact that a significant number of CVS patients in the Lawnwood service area were indigent, and thereby secured the support of other groups serving the indigent population to favor the application.

Dr. Sadow gave his support for the CON without asking for any commitment that he be given exclusive staff privileges to perform CVS if the CON was approved. And during all of his efforts on Lawnwood's behalf, it is clear that Lawnwood did nothing to suggest that Dr. Sadow would be barred from any CVS privileges. To the contrary, in every way Lawnwood fostered the expectation that Dr. Sadow would become a member of the Lawnwood staff for CVS when it became available.

The process for approval took nearly three years. It was not until midyear 1996 that Lawnwood's CON was finally approved. At about the same time, the corporate owners of Lawnwood changed CEOs, appointing Cantrell as the new chief administrator. With the approval in hand, Lawnwood and its new CEO began work on designing and constructing new facilities for CVS, which would not be completed until 1999.

Several years before this approval, Lawnwood had adopted a set of rules of governance for its Medical Staff, as required by law.[3] Under these Medical Staff Bylaws, staff physicians had the right to elect, retain, and remove medical staff officers, the members of the Medical Executive Committee (MEC), and the various department chairs and vice chairs. These rules specified that the medical staff would recommend which doctors should be allowed to practice in which medical areas. They also provided that exclusive privileges would be limited to only four specified areas. Cardiovascular surgery was not a specialty designated for exclusive privileges.

The Bylaws provided for a Credentialing Committee to recommend initial grants of staff privileges, and a Re-credentialing Committee to recommend renewals of privileges previously granted. The medical staff elects members of these committees in annual elections. The committees make the initial decisions on all applications for first-time grants of privileges

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[3] § 395.0193, Fla. Stat. (1998) (each licensed facility shall provide for peer review of physicians and shall develop written, binding procedures by which such peer review shall be conducted).

and renewals, and then forward their recommendations to the MEC.[4] The MEC in turn makes the final recommendations and forwards them to the Board of Trustees for approval.

The corporate entity operating Lawnwood is directly governed by a Board of Trustees with its own separate bylaws. The Medical Staff Bylaws specified that the Board of Trustees of the corporate entity owning the Hospital could not "unreasonably withhold" approval of final credentialing recommendations of the MEC. In short, the Board of Trustees agreed that it would approve recommendations by the MEC as to privileges unless it could state a reason with just cause.

The trial evidence as to Dr. Sadow's competence as a surgeon was substantial and unchallenged. From the late 1980s through 1999, Dr. Sadow had been doing an average of about 150 surgeries per year at Palm Beach Gardens and Jupiter Hospitals, the majority of which were high risk, open heart procedures. He demonstrated a constant mortality rate in the area of 3-4%, which is low for these high risk procedures. Moreover the evidence was that he had been sued only once for medical malpractice, and that suit had resulted in a verdict in his favor (which this court declined to disturb on appeal).[5]

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[4] The Medical Staff Bylaws provide that: "The Medical Executive Committee shall consist of the officers of the Medical Staff, the Chairman of the Departments of Medicine and Surgery, four (4) members elected at large from the Active Staff, and the Past President of the Medical Staff."

[5] *Wiggins v. Sadow,* 925 So.2d 1152 (Fla. 4th DCA 2006) (jury verdict in favor of surgeon in medical malpractice action

In April 1997 Dr. Sadow filed a formal application for non-exclusive surgical privileges in general thoracic surgery and CVS. There was never any question of his competence, qualifications or experience to perform CVS. His was the only pending application for CVS privileges. Cantrell assured him that his application would be formally approved by the corporation. The Credentialing Committee and the MEC approved his application. In January 1998 Lawnwood formally accepted the recommendations and approved his application, but for general thoracic surgery only. Lawnwood refused to consider his application for CVS, stating only that the new facility was as yet undeveloped.

Actually Cantrell and the corporate owners of Lawnwood had privately decided by then that CVS would be given only under an exclusive grant to a single surgeon or group. They had also privately decided that Dr. Sadow would not be considered for CVS and would be limited solely to general thoracic surgery, in spite of the fact that CVS was his area of practice. In fact, Lawnwood decided that Dr. Sadow's

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not against manifest weight of evidence requiring new trial; case simply presented disputed issues of fact resolved by jury; surgeon lacerated patient's renal vein during surgery because of patient's anatomical anomaly found in just 1-2% of population; defense expert testified surgeon met standard of care because many radiologists would not have recognized anomaly from pre-surgery CT scan; not unreasonable that surgeon failed to recognize it during surgery; plaintiff's expert conceded he once failed to recognize same anomaly before surgery).

former partner, Dr. Downing, would be its only candidate for the CVS exclusive privilege.[6]

Dr. Sadow nevertheless filed new applications for nonexclusive CVS privileges in March and April 1998. In June 1998 Cantrell acknowledged to Dr. Sadow that the Board of Trustees wanted CVS privileges to be given exclusively to a single provider. Dr. Sadow tried to dissuade Lawnwood from such exclusivity. He argued that it would be bad for patient care; that patients and their cardiologists need readily available sources in the area for second opinions as to open heart surgery and its alternatives; that competition between surgeons doing CVS benefits the community and patients; and that in any case an exclusive grant to a group normally rejecting Medicaid patients would be against the specific needs of the Lawnwood indigent community — a subject that had figured prominently in their CON application.

In early 1999 Lawnwood received a certificate of occupancy for its new cardiac surgical facility. Once again Dr. Sadow applied for CVS privileges. Once again the MEC approved his application. Once again the Board of Trustees denied it. Significantly, Lawnwood stipulated at trial that its denial of CVS privileges was not based on his competency or qualifications as a surgeon. After a protracted dispute with its medical staff over the issue, Lawnwood ultimately contracted with Dr. Downing exclusively to perform CVS at Lawnwood and refused to allow Dr. Sadow to perform CVS.

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[6] It should be noted that Lawnwood ultimately approved the Downing group for exclusive privileges in CVS before its facility was finally opened.

2. The Defamation

By August 1998 when Pentz became the next CEO of Lawnwood, relations between the Board of Trustees and the Medical Staff had become tense as a result of the decision of the Board of Trustees to override medical staff recommendations as to credentialing, specifically including CVS. Learning of the intent to award CVS privileges exclusively to the single surgeon/group, the MEC created a special committee to determine whether CVS privileges should be added to the Lawnwood list of exclusive privileges. In July 1998 the MEC decided that CVS should be open to all qualified staff surgeons at Lawnwood and not limited to a single provider. Dr. Sadow promptly filed another application for CVS.

In refusing to consider Dr. Sadow's pending requests for CVS privileges, the Board of Trustees adopted a resolution barring further applications from its current staff, an action pointedly directed at Dr. Sadow. Pentz wrote the Staff Committees and MEC that the search for candidates for CVS privileges was now closed, while simultaneously telling Dr. Downing to file his application with the Credentials Committee. Pentz "tabled" Dr. Sadow's. In fact the burial of his application for CVS lasted for several years, long after the new cardiac surgical facility opened.

In late 1998 the MEC met once again to consider the CVS issue. Pentz attended the meeting and sought to force the MEC to reject Dr. Sadow's application in accordance with the resolution of the Board of Trustees. The Chair of the MEC repeatedly ruled Pentz out of order, that Pentz was attempting to in-

terfere on a matter of medical qualifications. Pentz heatedly retorted that the Chair was obstructing the CEO. The MEC again recommended that Dr. Sadow be approved for CVS privileges.

Shortly thereafter, the Board of Trustees wrote the MEC and the two credentialing committees that it had granted Pentz the sole authority to contract for exclusive CVS privileges and to negotiate with Dr. Downing for that purpose. It added that the moratorium on CVS privileges had been modified to that extent only and the committees should begin to review and recommend Dr. Downing and his group. Meanwhile the Board of Trustees requested its corporate parent to investigate the physicians in charge of the credentialing committees at Lawnwood, and especially the Chair of the MEC, to determine whether they had violated their "fiduciary duty" to the stockholders of Lawnwood.

As provided in the Medical Staff Bylaws, in March 1999 the medical staff held its regular annual elections for staff officers, who *ex officio* determine the compositions of the credentialing committees and the MEC. The Chair of the MEC now became elected President of the medical staff. The Board of Trustees of Lawnwood responded to the election by passing an emergency resolution removing all these newly elected officers, department chairs and members of the credentialing committees. In their place the Board of Trustees appointed its own choices for all these medical staff positions to govern the medical staff until the next regularly scheduled election. The Board of Trustees justified its unprecedented action by asserting that a "crisis" existed, caused by an alleged failure of the medical staff to engage in "good

faith peer review," a failure to apply credentialing standards properly, a failure to comply with applicable federal and state law, and failure to comply with the standards required by accrediting entities.

In response, the recently elected medical staff officers filed an action in the circuit court for an injunction against the corporate action. They sought an order requiring the Board of Trustees to rescind its action and to reinstate the elected officers. They specifically requested that the injunction require the Board of Trustees to refrain from taking any action restricting, reducing, or impeding the full exercise of authority possessed by the Elected MEC under the provisions of the Medical Staff Bylaws, from exercising or attempting to exercise any powers or authority as Medical Staff Officers or members of the MEC; and for the corporate appointees to relinquish their respective offices to the Elected Officers and the Elected MEC.

The circuit court held an evidentiary hearing on the injunction and essentially granted all of the relief sought.[7] This court affirmed the injunction, subject to a new hearing on the amount of the bond.[8] While that injunction was on appeal, Dr. Sadow filed the present action, initially claiming only breach of contract.

As a result of the refusal of the Medical Staff to submit to corporate control of credentialing decisions

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[7] *See Lloyd v. Lawnwood Med. Ctr., Inc.*, 2000 WL 309305 (Fla. 19th Cir. Feb. 16, 2000).

[8] *See Lawnwood Med. Ctr., Inc. v. Lloyd*, 773 So.2d 114 (Fla. 4th DCA 2000).

at the hospital, Lawnwood convinced the Florida Legislature to enact the "Hospital Governance Law" applying only to hospitals in St. Lucie County. In disregard of the contract with the medical staff that had by then been in force for several years, the statute gave the Board of Trustees of Lawnwood full authority to override credentialing decisions. The Medical Staff officers sued for a declaratory judgment that the statute unconstitutionally impaired the contract between the Medical Staff and the corporation. The trial judge agreed with the medical staff and was affirmed on appeal. *See Lawnwood Med. Ctr., Inc. v. Seeger,* 959 So.2d 1222 (Fla. 1st DCA 2007). Lawnwood persisted in trying to salvage its legislative victory, but the Florida Supreme Court found the statute unconstitutional. *See Lawnwood Med. Ctr., Inc. v. Seeger,* 990 So.2d 503 (Fla. 2008).

While Dr. Sadow's lawsuit was pending, in November 200' Lawnwood hired Dr. Pinon as a new emergency room physician to staff Lawnwood's Walk-In Clinic in Fort Pierce, several blocks from the hospital. A few weeks after he arrived, Lawnwood arranged for an "open house" reception at the Clinic to introduce Dr. Pinon and its remodeled Walk-In Clinic facilities to the community. The occasion was held in the early evening hours after work. Just a day or two before the open house, however, another new CFO of Lawnwood, Dunwoody, then made these statements to Dr. Pinon: that Dr. Sadow was a bad doctor, that he had been suing the hospital, that he was not a good person, and that he was not someone to whom he should refer patients.

At the open house, there were "a lot of people" at the Clinic for the occasion. Some were patients, some

were referring physicians, and there were others. It was on this occasion that Dr. Pinon met Dr. Sadow for the first time. He had stepped into Pinon's office at the Walk-In Clinic during the reception, accompanied by other physicians to introduce himself. At that point, Pentz and Dunwoody (CEO and CFO) also approached Dr. Pinon in the same area. Dr. Sadow left, crossing paths with the two corporate officers.

Now inside the office — having just encountered Dr. Sadow leaving the area — Dunwoody stated to Dr. Pinon: "this is part of the problem that we've discussed to [sic] you about ... Dr. Sadow and doctors in the community."[9] Pinon responded that he was new to the area and didn't know the doctors in the community. Pentz and Dunwoody then referred to a book containing a list of all the doctors in the community and their photographs, saying it would reveal the "problem doctors".

A day or two later, Dunwoody, a Mr. Loveless, and the office manager Ms. Robertson met with Dr. Pinon in his office. Dunwoody proceeded to show him a book of staff physicians at Lawnwood. He placed a dot next to the entry for "certain colleagues you should not refer patients to," one of whom he specifically recognized from the open house as Dr. Sadow. Dr. Pinon responded that Dr. Sadow seemed to him "like a really nice guy" and asked Dunwoody what the problem was with him. Dunwoody responded

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[9] Conspicuously, the evidence does not show Pentz correcting or stopping Dunwoody from making these comments, but apparently remaining silent while Dunwoody spoke about Sadow and the "problem doctors".

that it was a long story but then made these statements:

> " 'Dr. Sadow was in partner[ship] with another doctor who we gave an exclusive contract to for open heart surgery. There was some disagreement between Dr. Sadow and his partner. He didn't get the contract. And now he is suing us. *And he is not a good doctor. He has had multiple lawsuits filed against him. He is a bad person. And quite frankly, Dr. Pinon, I would not send my dog to him for surgery. And you, being from the military, and if you care about your patients, you would do the same,'* quote unquote." [e.s.]

Dr. Pinon confirmed that Dunwoody's statements were in the presence of Loveless and Robertson. Dr. Pinon also made clear that he understood Dunwoody to be speaking on behalf of the Lawnwood corporation.

Dr. Pinon testified, describing the comments' impact on him:

> "When Mr. Dunwoody made those statements, he was the chief financial officer of Lawnwood Medical Center. In my mind it would have been like a general telling me, 'You are not to do this, this, and that.' So I had very mixed, confused feelings. I hadn't been here very long. So I was — I was — I want to use the word appalled. I was concerned because this was my first civilian job, and I knew Lawnwood HCA, the corporation, sub-corporations, was a very big corporation. And I couldn't — I couldn't conceive that

they would allow that type of action to happen."

Dr. Pinon admitted that he related Dunwoody's statements about the competency of Dr. Sadow to other doctors. He testified that he repeated the comments to Dr. Fromang, a urologist; Dr. Marshall, a radiologist; Dr. Ramesh, a pulmonologist; Dr. Perry Lloyd, a pulmonologist; and Dr. Shadani, a cardiologist. He further explained that he had been told the same bad things about each of them; that a couple of them who had been "fired" were also suing the hospital because of some issue that happened with the medical staff, that these fired doctors were replaced with other doctors appointed by the corporation, that all of them were "bad doctors, troublemakers, and that I had no business referring any patients to them." He said, "I have been told that they were just as horrible and malicious, and as horrible as Dr. Sadow." He explained that "the dots" on the photos to which he referred included the doctors just mentioned: Fromang, Nayyar, Lloyd, Marshall; that all had lawsuits against the hospital, that all had been treated the same way; and that Dunwoody's statements made all of that clear. Sometime later, Dr. Pinon again asked CEO Pentz what was wrong with Dr. Sadow. Pentz responded: "That is a closed case. As long as I am CEO of this hospital, Dr. Sadow will never practice cardiovascular surgery."

At no time after the claim of slanders per se had been brought to its attention by plaintiff's counsel did Lawnwood ever offer a retraction. In its pleadings, Lawnwood denied that any such statements had been made. By way of affirmative defense, Lawnwood also pleaded that even if the statement

about not sending a dog to Dr. Sadow had been spoken, it was merely "rhetorical hyperbole". At trial it offered testimony that if the jury found that Dunwoody had made the statements he was "just kidding", that the statements were "just an epithet", and that they were "not really anything" and should be given little weight.

Dr. Sadow testified that he felt embarrassed, humiliated and shamed by the slanders. He said that every time he entered Lawnwood Hospital he was reminded of them and could hardly escape thinking about them. He explained that, as a result of the credentialing dispute and the slanderous statements of the Hospital, in time all his referrals from St. Lucie and Martin counties "dried up" and eventually his practice of open heart surgery came virtually to an end in this area. He added that he was also in a contentious divorce when these events were occurring. Ultimately he was offered surgical positions in Chicago and Tennessee, but he turned them down because his young children resided primarily with their mother here, and he did not want to live far away from them.

At the close of the first phase of the trial, Dr. Sadow's counsel argued that Lawnwood's slanders were "outrageous and intentional". He argued that: "No doctor on the medical staff in good standing of the hospital should be subjected to that type of treatment by a member of the senior management team of the hospital, speaking on behalf of that hospital." More specifically he argued that the surgery-on-a-dog statement could not possibly be considered forgivable hyperbole, "rhetorical or otherwise" because it conveyed only one meaning: "It exposed Dr. Sadow

to ridicule in his business and profession. And that was the intent."

At the close of the first phase of trial the Court instructed the Jury as to entitlement to punitive damages for the slander per se claim that:

> "Punitive damages are warranted if you find, by clear and convincing evidence, that Lawnwood's primary purpose in making the statement was to indulge ill will and hostility and intent to harm Dr. Sadow. If you find for Dr. Sadow and against Lawnwood, and you also find that clear and convincing evidence shows that Robert Dunwoody was personally guilty of an intentional misconduct which was a substantial cause of loss, injury or damage to Dr. Sadow, and that such conduct would warrant an award of punitive damages against him, in accordance with the standards that I have mentioned, then in your discretion, you may determine that punitive damages are warranted against Lawnwood."

The jury returned a verdict finding liability against Lawnwood for the slanders per se. As to compensatory damages for the defamations, it specified zero damages as to each category, including nominal damages. The jury found, nonetheless, that punitive damages were warranted.

The evidence in the second phase of the trial was devoted almost exclusively to the financial condition of the corporate structure of Lawnwood. Dr. Sadow offered evidence, not contradicted by Lawnwood, that at the time of trial Lawnwood had a net worth ex-

ceeding $100 million. Dr. Sadow's financial expert witness relied primarily on annual financial statements of the corporation for the years preceding trial. The expert testified that punitive damages from $30-38 million would not financially destroy the hospital. On its part, Lawnwood produced as its only witness a Director of Public Relations and Marketing who testified primarily as to new ethics training recently started at the hospital.

In closing argument, Dr. Sadow's counsel never suggested a specific sum for punishment. He did make clear, however, that he was not seeking the amount his expert had suggested as the ceiling on damages that would not ruin the corporation, the figure of $30-38 million. He stressed several times that he sought only an amount the Jury determined would be sufficient to punish and deter, not a sum that would financially destroy the institution.

He emphasized that the slanders were not limited to a single statement, but included all the statements described by Dr. Pinon. He added that the slanderous statements were not solely about Dr. Sadow but were actually directed at all physicians who had sued the Hospital, who were described as being "just as bad as he was," suggesting a pattern or practice on the part of Lawnwood.

He described the slanders as egregious, pointing out they came from one of the most senior officers of the corporation. He argued that the statements had "a high probability of injury and damage" to Dr. Sadow. He argued that Lawnwood's slanders about its own physicians were "improper, unethical and immoral" and had in fact damaged him.

The trial Judge gave the Florida Standard Jury Instruction on punitive damages, adapted to the issues in the case.[10] The trial Judge also used the form

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[10] *See* Fla. Std. Jury Instr. (Civ.) MI 4.4 *g.(1)* and PD 1. Specifically, in phase 1 the Jury was instructed as follows:

> "Punitive damages are warranted if you find, by clear and convincing evidence, that Lawnwood's primary purpose in making the statement was to indulge ill will and hostility and intent to harm Dr. Sadow. If you find for Dr. Sadow and against Lawnwood, and you also find that clear and convincing evidence shows that Robert Dunwoody was personally guilty of an intentional misconduct which was a substantial cause of loss, injury or damage to Dr. Sadow, and that such conduct would warrant an award of punitive damages against him, in accordance with the standards that I have mentioned, then in your discretion, you may determine that punitive damages are warranted against Lawnwood. Intentional misconduct means that Robert Dunwoody had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to Dr. Sadow would result, and despite that knowledge, intentionally pursue that course of conduct resulting in injury or damage. Now, clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue."

In phase 2 it was instructed:

> "Ladies and gentlemen of the jury, you will now determine the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following: The nature, and degree of misconduct, and the related circumstances including the following,

of verdict contained in the standard instructions. The Jury's unanimous verdict was that Lawnwood specifically intended to harm Dr. Sadow, that Lawnwood had in fact harmed him by the slanders per se. The Jury also found that in slandering Dr. Sadow Lawnwood had not been motivated solely by unreasonable financial gain. The Jury assessed punitive damages against Lawnwood in the sum of $5,000,000.

B. The Claim of Immunity from Contract Liability

Lawnwood's claim of immunity is founded on § 395.0191(7).[11] It argues that the statute must be

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whether the wrongful conduct was motivated solely by unreasonable financial gain; whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by Lawnwood; whether, at the time of the loss, injury or damage to Dr. Sadow, Lawnwood had a specific intent to harm Dr. Sadow and the conduct of Lawnwood did, in fact, harm Dr. Sadow, and Lawnwood's financial resources. However, you may not award an amount that would financially destroy Lawnwood. You may, in your discretion, decline to assess punitive damages. Your verdict on the issues raised by the punitive damages claim of Dr. Sadow against Lawnwood must be based on the evidence that has been received during the trial of the first phase of this case, and on the evidence that has been received in these proceedings, and on the law which I have instructed you."

[11] § 395.0191(7), Fla. Stat. (2009) ("There shall be no monetary liability on the part of, and no cause of action for injunctive relief or damages shall arise against, any licensed facility, its governing board or governing board members, medical staff, or disciplinary board or against its agents, investigators, witnesses, or employees, or against any other person, for any action arising out of or related to carrying out the provisions of this section, absent intentional fraud").

construed as written.[12] We agree with that ever-present rule of statutory comprehension.

It is indeed the first principle of statutory interpretation that the meaning of statutes is derived primarily from the text employed by the Legislature.[13] If the Legislature's words are not ambiguous, we accord them their plain meaning.[14] All parts of a statute should be given effect if possible, for the Legislature is presumed not to have enacted statutory terms having no purpose.[15] Thus we strive to avoid reading statutes so that part of its terms have no effect.[16] As the court cautioned in *Donato v. American Telephone and Telegraph Company*, 767 So.2d 1146 (Fla. 2000): "we are precluded from construing an unambiguous statute in a way which would ***extend, modify, or limit***, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." [e.s.] 767 So.2d at 1150-

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[12] *Arnold, Matheny & Eagan P.A. v. First Am. Holdings Inc.*, 982 So.2d 628, 633 (Fla. 2008) (statutes must be construed by looking primarily at the statutory language; if the language is clear and unambiguous, then the court has no further reason to apply the rules of statutory construction).

[13] *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla. 1998); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla. 1982)..

[14] *Golf Channel v. Jenkins*, 752 So.2d 561, 564 (Fla. 2000); *Moonlit Waters Apts., Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996).

[15] *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992).

[16] *State v. Goode*, 830 So.2d 817, 824 (Fla. 2002).

51.[17] We conclude that Lawnwood's construction of the statutory immunity text would have us ignore an explicit limitation as to its extent, thereby enlarging the grant of immunity beyond its plain meaning.

The provisions of § 395.0191 lay down general rules for hospitals in setting up procedures and standards for staff membership and clinical privileges. The immunity of § 395.0191(7) is not a broad, general grant immunizing every kind of hospital liability *after* granting clinical privileges. The plain text confines its immunity only to "action[s] arising out of or related to *carrying out the provisions of this section*" [e.s.]. It is thus a specific, targeted, grant of partial immunity extending only for its credentialing decisions.[18]

Dr. Sadow did not allege or rely on any violation of the *statute*. Instead he alleged and proved that, contrary to its own Medical Staff Bylaws, Lawnwood invalidly granted an outside surgeon exclusive CVS

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[17] *See also Fla. Dept. of Bus. and Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So.2d 374, 382-83 (Fla. 1999) (same quote); *Hill v. State*, 688 So.2d 901, 908 (Fla. 1996) (same quote).

[18] For this reason, we disagree with Lawnwood's able appellate counsel that *Feldman v. Glucroft*, 522 So.2d 798 (Fla. 1988) and *Noble v. Martin Memorial Hosp. Ass'n Inc.*, 710 So.2d 567 (Fla. 4th DCA 1997), support immunity in this case. In *Feldman* the medical review board was obviously acting within the scope of its authorized function relating to the standard of care. *Noble* involved a denial of all privileges, in contrast to the case we confront today involving a simple breach of contract between the hospital and one of its staff surgeons. *See also Fla. Dept. of Envtl. Protection v. ContractPoint Florida Parks, LLC*, 986 So.2d 1260 (Fla. 2008) (broad meaning of immunity in two provisions limited by provisions in another).

privileges, and used it to stop Dr. Sadow from performing CVS. He showed that the Medical Staff Bylaws, accepted and approved by the corporate Board of Trustees, did not authorize exclusivity in CVS. He proved that he had been repeatedly recommended for CVS by the hospital's own Credentialing Committee and approved by the MEC. He proved that Lawnwood's refusal to accept the MEC approval was not supported by "a valid reason under the circumstances", the standard instructed by the trial Judge. By giving one surgeon an unauthorized exclusive and using that invalid action to bar Dr. Sadow from CVS, he proved that Lawnwood was simply guilty of breach of contract.[19]

Under the facts and circumstances proven at trial, we agree with the trial judge that his claim for breach of contract was not barred by the statutory immunity provision. We therefore affirm on this issue.

C. Punitive Damages

We now confront Lawnwood's contention that the amount of punitive damages is excessive under the United States Constitution. In *Engle v. Liggett Group Inc.*, 945 So.2d 1246 (Fla. 2006), the court recognized that differing standards of review, one under state law and another under federal law, may now apply to punitive damages in Florida. But Lawnwood does not here challenge the amount of punitive damages under Florida law-its sole contention is that the

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[19] *See Hosp. Corp. of Lake Worth v. Romaguera*, 511 So.2d 559, 560 (Fla. 4th DCA 1986) (contract between hospital and physician affected by modification of bylaws).

amount is excessive under federal law. We therefore review the federal issue raised by Lawnwood under its de novo standard of review.[20]

The federal law argued by Lawnwood is part of a series of decisions by the United States Supreme Court. It relies on two of those decisions, *State Farm Mutual Automobile Insurance Company v. Campbell,* 538 U.S. 408 (2003) [*State Farm*], and *BMW of North America Inc. v. Gore,* 517 U.S. 559 (1996) [*BMW*]. Lawnwood argues that *BMW* and *State Farm* both hold that the Due Process Clause of the Fourteenth Amendment categorically bars any punitive damages exceeding a stated ratio with compensatory damages, usually 3:1 or 4:1. Dr. Sadow responds that Lawnwood is incorrect as to the scope of these holdings. He contends that *State Farm* and *BMW* actually disclaim applying the ratio to all punitive damages awards, and that both decisions explicitly hold that the ratio may not apply in cases involving intentional and malicious conduct. We conclude that *TXO Production Corporation v. Alliance Resources Corporation,* 509 U.S. 443 (1993), would also seem applicable. *TXO* held that punitive damages of $10 million imposed for intentionally malicious misconduct are not improper even though actual losses were less than $20,000.

BMW was the first to apply a ratio as the proper test of proportionality in a specific case. But the opinion declared that proportionality is not always a matter of numerical comparison between compensatory and punitive damages:

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[20] *See Cooper Indus., Inc. v. Leatherman Tool Group Inc.,* 532 U.S. 424 (2001); *Engle,* 945 So.2d at 1263.

> "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, *low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.* A higher ratio may also be justified in cases in which the injury is hard to detect or *the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach.* Once again ... we need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." [e.s.]

517 U.S. at 582-83. The Court explained:

> "In our federal system, States necessarily have *considerable flexibility* in determining the level of punitive damages that they will allow *in different classes of cases and in any particular case.* Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to *vindicate the State's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests* does it enter the zone of arbitrariness that violates

> the Due Process Clause of the Fourteenth Amendment." [e.s., c.o.]

517 U.S. at 569.

State Farm was the next case to apply a ratio but repeated that: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." 538 U.S. at 425. The Court made clear that "ratios greater than those we have previously upheld may comport with due process where *'a particularly egregious act has resulted in only a small amount of economic damages.'* " [e.s.] 538 U.S. at 425. *State Farm* underlined that "[t]he precise award in any case ... *must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.*" [e.s.] 538 U.S. at 425. States may vary the level of punitive damages in disparate classes of cases to reflect different policies.

In considering these cases, we understand that the federal rule of a fixed ratio between punitive and compensatory damages was intended to apply primarily to the kind of "wrongdoing" involved in *State Farm* and *BMW*. We read *State Farm* and *BMW* both to recognize that nevertheless the States may specify some unusually reprehensible conduct for punitive damages that need not be proportioned to compensatory losses. The issue we face today is whether this case is governed by *State Farm* and *BMW* or perhaps instead by *TXO* where no ratio was used. We proceed to that analysis.

TXO involved intentional wrongdoing. Alliance, the owner of mineral rights on a 1,000 acre tract of land with significant oil and gas deposits, sued TXO for slander of title. Alliance had leased the oil and

gas rights to TXO for substantial payments over a period of years. Evidence showed that TXO sued Alliance to claim a cloud on title TXO knew to be baseless. TXO had already obtained a quit claim deed from the remote vendor whose former interest it claimed had clouded the interest of Alliance. It had also attempted to procure a false affidavit from a witness. TXO sought to force Alliance into renegotiating the lease to reduce royalty payments and thereby enhance its own financial interests. The suit resulted in a verdict awarding $19,000 in compensatory damages and $10 million in punitive damages to Alliance. TXO argued that the punitive damages were 526 times greater than actual losses and therefore facially excessive under the Fourteenth Amendment.

The Supreme Court first pointed out the great difficulty in comparing jury awards of punitive damages: "Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." 509 U.S. at 457. The Court emphasized a policy of refusing to draw a single test applicable to all awards. Instead it highlighted some of the factors on which the state court relied in affirming the award. In upholding the punitive damages, the critical factor was intentionally malicious conduct causing harm. The Supreme Court also accepted the State's policy rationale that "punitive damages should bear a reasonable relationship *to the harm that is likely to occur* from the defendant's conduct as well as to the harm that actually has occurred." [e.s.] 509 U.S. at 459-60.

In *TXO* Justice Kennedy — who would later become the author of the majority opinion in *State*

Farm — explained that he concurred with upholding the substantial punitive damages award even though it lacked proportionality with compensatory damages because:

> "*TXO acted with malice.* This was not a case of negligence, strict liability, or respondeat superior. TXO was found to have committed, through its senior officers, *the intentional tort of slander of title.* The evidence at trial demonstrated that it acted ... 'through a pattern and practice of fraud, trickery and deceit' and employed 'unsavory and malicious practices' in the course of its business dealings with respondent. '[T]he record shows that this was not an isolated incident on TXO's part — a mere excess of zeal by poorly supervised, low level employees — but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power.' " [e.s.]

509 U.S. at 468-69. He agreed that:

> "*it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence.* I confess to feeling a certain degree of disquiet in affirming this award, but the record, when viewed as a whole, makes it probable that *the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice. There was ample evidence of willful and*

> *malicious conduct by TXO in this case;* the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondent's attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment." [e.s.]

509 U.S. at 469. Notably, when he became the author of the later majority opinion in *State Farm,* Justice Kennedy's opinion did not recede from, disapprove, or indicate in any way that *TXO* was no longer good law. In fact his *State Farm* opinion relied on *TXO* to restate the holding that no simple mathematical formula controls the issue of excessiveness for every case. 509 U.S. at 469.

TXO appears specially apt for the wrongdoing in this case. In denying the motion to set aside the punitive damages, the trial judge described the evidence as basically showing that Lawnwood set out to destroy Dr. Sadow. Lawnwood engaged in a pattern and practice of slandering any doctor conflicting with hospital administration. Willfully and maliciously destroying the reputation of respected physicians and surgeons could reasonably be high on any list of reasons for severe punishment of wrongdoing. Indeed it could be thought worse than merely slandering title to property. Here too it was rational for the jury to find defendant had acted willfully and with express malice to harm the plaintiff. *TXO* supports considerable punishment without proportionality for conduct willfully and maliciously harming the plaintiff.

These federal authorities also make clear that state law and policy play a critical role in review of punitive damages, so we must consider Florida's applicable statutory and decisional law relating to punitive damages and defamation. We point out that Florida has codified specific policies for punitive damages in civil litigation. By statute the general Florida rule now provides that "an award of punitive damages may not exceed the greater of ... three times the amount of compensatory damages ... or ... the sum of $500,000."[21] But in a significant exception to this limiting ratio, the statute specifies:

> "Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, *there shall be no cap on punitive damages.*"[22] [e.s.]

Plainly this Florida statute eliminates mathematical proportionality with compensatory damages as a matter of state law and policy in cases of intentionally malicious harmful misconduct.[23]

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[21] § 768.73(1)(a), Fla. Stat. (2009). *See also* § 768.73(4), Fla. Stat. (2009) (jury may not be instructed as to these provisions). In oral argument Lawnwood argued that the excess above $500,000 should be remitted.

[22] § 768.73(1)(c), Fla. Stat. (2009).

[23] *See Owens-Corning Fiberglas Corp. v. Ballard,* 749 So.2d 483, 489 n.9 (Fla. 1999) ("The Legislature has placed no cap on punitive damages awards where the defendant specifically intended to harm the plaintiff and the defendant's conduct did in fact harm the plaintiff").

Florida's statutory law removing a ceiling on punitive damages for intentionally malicious harm suggests that any proportional ratio analysis required in negligence or business practices cases with only modest monetary or financial loss, would be incongruent when the claim involves, as here, the intentional infliction of malicious harm to an individual. Under Florida law applying to intentionally malicious harm, punitive damages is tied to unusually reprehensible misconduct, rather than some ratio relating to compensable losses.

This statute gives all who would consider such misconduct here clear warning that for intentional and malicious harm they can lawfully be punished to the extent of their personal ability to pay. It is apparent to us that the statute's provision allowing punitive damages without proportionality for intentional, malicious harm satisfies any *BMW* and *State Farm* concern for fair notice. The Due Process Clause is thus satisfied by this statute.

We further perceive that this Florida statute would not apply to the conduct in *State Farm* and *BMW* involving commercial policy and trade practices, with purely economic consequences of only slight individual financial harm. The express disclaimer disavowing universal ratios in *State Farm* and *BMW* implies that the *State Farm* and *BMW* ratios are intended mainly for modestly reprehensible business or commercial trade practices causing individual damages limited in size, extent or amount. Declining to apply the *State Farm* and *BMW* ratios would not necessarily conflict if state law eliminates proportional ratios in cases of unusual reprehensibility. The punitive damages in this case thus require

us to examine the reprehensibility of Lawnwood's wrongdoing under Florida law.

1. Reprehensibility of Lawnwood's Conduct

Under these federal cases, when punitive damages are substantial the first issue is the *enormity*[24] factor: whether the misconduct involves a *high degree of culpability* and *blameworthiness.* The Court has instructed State courts to consider three *guideposts:*

> (1) the degree of *reprehensibility* of the defendant's misconduct;
>
> (2) the *disparity between* the actual or potential *harm suffered* by the plaintiff *and the punitive damages award;* and
>
> (3) the *difference between the punitive damages* awarded by the jury and the civil penalties authorized or imposed *in* comparable *cases.* [e.s.]

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[24] *See* AMERICAN HERITAGE DICT. (Electronic Edition) (search term *enormity:* "The quality of passing all moral bounds; excessive wickedness or outrageousness. A monstrous offense or evil; an outrage"); MERRIAM-WEBSTER UNABRIDGED DICT. (CD-ROM ed.) (search term *enormity:* the quality or state of exceeding a measure or rule, or of being immoderate, monstrous, or outrageous; as 'the enormity of the offense'; a grave offense against order, right, or decency"). Modern usage of the term *enormity* misuses it to describe merely large in physical size. But the *BMW* sense in which it is used obviously refers to the traditional meaning of the word.

State Farm, 538 U.S. at 418; *BMW*, 517 U.S. at 575. The first of these is explicitly the critical one and in this case appears to be dispositive.[25]

Reprehensible, more blameworthy and *enormity* are essential to an understanding of the Supreme Court's meaning. Although much civil litigation involves misconduct, the *reprehensibility* required for harsh punitive damages entails a *high degree of culpability*. 517 U.S. at 580. To meet the reprehensibility required for high punitive damages, the Court implied that (as in TXO) the misconduct should be intentional, perhaps be gravely deplorable, deserving of severe condemnation, even threatening basic interests of an individual beyond purely economic loss. Conduct deserving the harshest punitive damages would be odious. It would pass moral bounds, be wicked or outrageous, and constitute a grave offense against right or decency. The disapproval expressed by state law should be avowedly strong and severe. We see that as the true meaning of the Court's *enormity* factor.

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[25] The reprehensibility of defendant's misconduct in a claim for punitive damages is by far the most significant factor. *BMW* said:

> "[punitive] damages imposed on a defendant should reflect 'the *enormity* of his offense.' This principle reflects the accepted view that some wrongs are *more blameworthy than others*. Thus, we have said that 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.' Similarly, 'trickery and deceit, are more reprehensible than negligence." [e.s., c.o.]

517 U.S. at 575-76; *State Farm*, 538 U.S. at 419.

a. Defamation under Florida law

The wrongdoing here is slander *per se*. In *Miami Herald Publishing Company v. Ane*, 458 So.2d 239, 241 (Fla. 1984), the court pointed out that "Florida's concern for individual reputation is reflected in article I, section 4, of the Florida Constitution." Florida has thus singled out defamation per se for special rules in civil tort litigation. In *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211, 217 (1887), the court held that statements defamatory per se are presumed harmful as a matter of law. In *Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591, 592 (1906), the court held that with defamation per se "the law presumes malice in their utterance" making it unnecessary to prove express malice. In *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 239 (1933), the court pointed out that the law's condemnation of defamation per se "has been affirmed from earliest times," explaining that "the injurious character" of defamation per se "is a *fact of such common notoriety established by the general consent of men*, that the *courts must of necessity take judicial notice of its harmful effect*." [e.s.] 146 So. at 236. *Layne* went on to hold:

> "Malice ... becomes therefore the gist of every actionable libel. Without malice, either express or implied by law, no tort could result from the publication of a defamatory statement concerning another, however untrue it might be. But the law always *conclusively implied* malice and damage when false and defamatory statements were deliberately published without excuse." [e.s., c.o.]

146 So. at 238-39.

In *Hartley & Parker v. Copeland,* 51 So.2d 789 (Fla. 1951), and *Commander v. Pedersen,* 116 Fla. 148, 156 So. 337 (1934), the court held that general damages are conclusively presumed to result from defamation per se and that "special damages need not be shown to sustain the action." 156 So. at 341. In *Miami Herald Publishing Company v. Brown,* 66 So.2d 679, 680-81 (Fla. 1953), the court made clear that general damages for defamation per se are "those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence." *Campbell v. Jacksonville Kennel Club,* 66 So.2d 495 (Fla. 1953), agreed that damages are presumed to result from defamation per se and need not be proved.

The singular protection afforded by Florida law to personal reputation in actions for defamations per se is further seen by the fact that punitive damages may be the primary relief in a cause of action for defamation per se. *Jones v. Greeley,* 25 Fla. 629, 6 So. 448, 450 (1889), held that malice is an intrinsic part of actions for defamation per se in order that the jury may consider punitive damages. In *Nodar v. Galbreath,* 462 So.2d 803 (Fla. 1984), the court added that the express malice for punitive damages under Florida law is present where the evidence shows that an intention to injure the plaintiff was the primary motive for statements defamatory per se.[26]

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[26] These state cases have consistently held that proof of liability for defamation per se — especially when based as here on a specific finding that the defamer acted with specific intent

to injure the plaintiff — is alone sufficient for the jury to consider punitive damages and that plaintiff need not show any proof of monetary loss. *Bobenhausen v. Cassat Ave. Mobile Homes Inc.*, 344 So.2d 279 (Fla. 1st DCA 1977), the court said:

> "We reject the ... argument that it is necessary before a plaintiff recover punitive damages that the amount of pecuniary loss be determined to a reasonable certainty. The general rule is that *in libel actions, even though no special damages may have been proven, a plaintiff may still recover punitive damages upon a showing that the publication was made for malice or ill-will toward him.*" [e.s., c.o.]

344 So.2d at 282. To the same effect is *Saunders Hardware Five and Ten, Inc. v. Low,* 307 So.2d 893 (Fla. 3d DCA 1974), where the court said:

> "we hereby adopt the general rule that where the defamation complained of is actionable per se, punitive damages may be awarded even though the amount of actual damages is neither found nor shown, for in such a case the requirement of a showing of actual damages as a basis of an award of exemplary damages is satisfied by the presumption of injury which arises from a showing of libel or slander that is actionable per se."

307 So.2d at 894. In *Matthews v. Deland State Bank,* 334 So.2d 164 (Fla. 1st DCA 1976), the court followed the decision in *Saunders Hardware,* holding that "[t]he instruction given by the trial court on actual malice is defective in that it does not fully inform the jury that the malice necessary for the award of punitive damages can be deduced from the publication itself" and that the trial court erred in instructing the jury that punitive damages could not be awarded unless an award of compensatory damages was made. 334 So.2d at 166. The Eleventh Circuit has so recognized Florida law on punitive damages in actions for defamation per se as set forth above. *Hunt v. Liberty Lobby,* 720 F.2d 631 (11th Cir.1983) (verdict for punitive damages can be returned only if jury finds defendant acted with type of ill will identified in *Matthews*). There are no conflicting decisions by any Florida appellate court.

The history of Florida law makes clear that that liability alone for intentionally malicious defamation per se will support substantial punishment in punitive damages. This unique aspect sets defamation per se apart from a comparable intentional tort — one that rightly could be considered its twin. Both fraud in the inducement and defamation per se depend on intentionally false statements meant to deceive and harm. But the critical distinction between them is that defamation harms persons and reputation, while fraud affects property rights and results only in financial loss. This difference plays an important role in a recent decision of this court, not cited by either party on appeal but referred to during the trial.[27]

In *Morgan Stanley & Company v. Coleman (Parent) Holdings Inc.*, 955 So.2d 1124 (Fla. 4th DCA 2007), one party to a stock transaction sued the other party, claiming fraud in the inducement. A jury awarded both compensatory and punitive damages. On appeal, we held that the evidence supporting the compensatory damages was entirely insufficient and that consequently no compensatory loss had been proved. We rejected plaintiff's argument in support of punitive damages, however, that no compensatory

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[27] At one point Lawnwood sought to convince the trial judge that even in cases involving slander per se plaintiff had to prove a specific monetary amount of injury to have the jury consider punitive damages. Ultimately, however, the hospital withdrew the argument and recognized the many Florida cases holding to the contrary. In this appeal, Lawnwood is consistent with its ultimate position in the trial court, and has not renewed the argument.

damages were necessary to support an entitlement to punitive damages:

> "It is fundamental that '[a]ctual damages and the measure thereof are essential as a matter of law in establishing *a claim of fraud.' 'Damage is of the very essence of an action for fraud or deceit.' Without proof of actual damage the fraud is not actionable.* Thus, to prevail in an action for fraud, a plaintiff must prove its actual loss or injury from acting in reliance on the false representation.
>
> "Even if CPH established the *fact* of some unquantified damage ... a *nominal damage* award ... is *not enough* to justify a punitive damage award *in a fraud case. Punitive damages for fraud cannot be based on nominal damages alone.* [e.s., c.o.]

955 So.2d at 1132. In short, a claim for punitive damages from fraud in the inducement failed if no amount of compensatory loss resulting from the fraud was actually proved.

But when the claim is defamation per se, liability itself creates a conclusive legal presumption of loss or damage and is alone sufficient for the jury to consider punitive damages. *Commander,* 156 So. at 341; *see also Bobenhausen v. Cassat Ave. Mobile Homes,* 344 So.2d 279, 281 (Fla. 1st DCA 1977), *cert. discharged,* 363 So.2d 1065 (Fla. 1978) (malice is presumed as a matter of law from the publication of such words). Therefore a finding of liability for slander per se, coupled with an express finding that the slander was intended to injure plaintiff and did in fact cause injury, authorizes the jury to consider and

assess punitive damages without any finding of an amount of compensatory damages. *See Lundquist v. Alewine,* 397 So.2d 1148, 1150 (Fla. 5th DCA 1981) (where defamation is actionable per se, punitive damages may be awarded even though the amount of actual damages is neither found nor shown); *Saunders Hardware Five and Ten v. Low,* 307 So.2d 893 (Fla. 3d DCA 1975), *cert. denied,* 330 So.2d 21 (Fla. 1976) (same); *Bobenhausen,* 344 So.2d at 281 (in libel per se even though no special damages proven, plaintiff may still recover punitive damages upon a showing that publication was made for malice or ill-will toward him); *see also Nodar,* 462 So.2d 803 (express malice under Florida common law is present where primary motive for defamation per se is shown to be intent to injure plaintiff); *Jones v. Greeley,* 25 Fla. 629, 6 So. 448, 450 (1889) (same).

To sum up, Florida's unusually high protection of personal reputation derives from the common consent of humankind and has ancient roots. It is highly valued by civilized people. Our state constitution and common law powerfully support it. This is a value as old as the Pentateuch and the Book of Exodus, and its command as clear as the Decalogue: "Thou shall not bear false witness against thy neighbor." The personal interest in one's own good name and reputation surpasses economics, business practices or money. It is a fundamental part of personhood, of individual standing and one's sense of worth. In short, the wrongdoing underlying the punitive damages in this case has Florida law's most severe condemnation, its highest blameworthiness, its most deserving

culpability.[28] For slander per se, reprehensibility is at its highest.

b. Comparison of economic injuries with defamation

In contrast to that vital personal interest here, the conduct in *State Farm* and *BMW* seems almost trivial. The minor economic injuries in those cases pale into insignificance next to the calumnies proven here. *BMW* is simpler, while the details of the *State Farm* case are extensive, but their differences become vivid when examined.

BMW 's conduct is nearly a trifle. The claim lay in a manufacturer failing to tell a consumer about minor paint damage to a new automobile during transit to the dealer, in which acid rain had tarnished the

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[28] Florida is not alone in this regard. *See* Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 854 n.43 (1985) ("Some federal judges and state courts have expressly recognized that *the standard for punitive damages in libel suits differs from the one applied in other tort actions.* [e.s.] ... Because most courts will grant punitive damages upon a showing of actual malice, such damages have been assessed even in cases in which actual damages were absent or merely nominal. See, e.g., *Goldwater v. Ginzburg*, 414 F.2d 324, 340-41 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (upholding award of $1 in actual damages and awards of $25,000 and $50,000 in punitive damages); ... *Newson v. Henry*, 443 So.2d 817, 824 (Miss. 1983) (it is 'not necessary to award actual damages as a prerequisite to awarding punitive damage[s]'); *Snodgrass v. Headco Indus.*, 640 S.W.2d 147, 157 (Mo. Ct. App. 1982) (upholding award of $1 in actual damages and $75,000 in punitive damages); *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976) (remanding, on the basis of a faulty actual malice instruction, a case in which the jury had awarded no compensatory damages and $10,000 in punitive damages))."

finish. The $600 cost of repainting represented 1.5% of the sale price. As a matter of policy, BMW did not disclose such presale repairs if less than 3% of the MSRP. Some may think the policy wrong; others may be left searching for the harm if the manufacturer corrects the blemish before delivery.

BMW's buyer sued for fraud, praying for $555,000, including punitive damages. His evidence was the repainting reduced the value of a new $40,000 car by 10%. The jury found $4,000 in compensatory damages and assessed $4 million in punitive damages for the nondisclosure, finding "gross oppressive and malicious" fraud. The finding was largely based on BMW's nationwide policy outside the State of Alabama and case at hand. In post trial motions BMW showed the policy was lawful in 25 of the States. The Alabama supreme court reduced the punitive damages to $2 million and thus allowed the judgment to stand.

The Supreme Court accepted the rationale that BMW suppressed a material fact state law obligated it to disclose. But the Court stressed that reasonable people could disagree as to whether the nondisclosure policy was even wrong. If reasonable people could disagree whether conduct should be deemed improper, its disapproval quotient must be very low and reprehensibility small by any measure. Yet, even as reduced by the state court, the Supreme Court found the punitive damages "grossly excessive" for the conduct in question. And in spite of the fact that the business practice may have been deemed actionable for state tort liability, the Court held it lacked the *high degree of culpability* needed to war-

rant more than a modest amount of punitive damages. 517 U.S. at 580.

State Farm concerned a liability insurance carrier refusing to settle a wrongful death claim against its insured during extensive litigation, with the insured suffering a money judgment in excess of the policy limits. During the litigation the carrier insisted on disputing liability for the accident even though the witnesses placed the blame on the insured in attempting to pass other vehicles unsafely, causing the collision. The carrier declined offers to settle within policy limits, meanwhile assuring the insured that their assets were safe from judgment. The carrier took the case to trial and suffered a judgment well above policy limits.

When the carrier refused supersedeas, the insured handled the appeal and entered into a settlement with the plaintiff. In time, the carrier paid the entire excess judgment and expenses. Nevertheless, the insured sued the carrier for bad faith, fraud and infliction of emotional distress. Over the carrier's objection, the trial court allowed evidence of its practice over two decades of minimizing payouts in claims handling in other states. The jury awarded actual damages of $2.6 million and punitive damages of $145 million. These were reduced to $1 million and $25 million respectively.

After applying the *BMW* standards, *State Farm* demolished any reprehensibility quotient with the dismissive observation that its conduct merely "merit[ed] no praise." 538 U.S. at 419. If the worst thing one can say about conduct is only that it merits no praise, is it even blameworthy? The Court held that

"a more modest punishment" would have satisfied any legitimate state objectives in punishment for the carrier's conduct. 538 U.S. at 419-20. Here again, the state court punishment was largely based on conduct in other states in other cases, some of which was lawful but none of which harmed the plaintiff.[29]

Obviously whatever trace of reprehensibility for failure to settle a claim within policy limits was left to be squeezed out of the carrier's conduct is minor by any objective culpability standard. Indeed the carrier's conduct could reasonably be deemed as lacking any culpability at all, for the insured had already been made whole by the ultimate payment of the entire judgment above policy limits and expenses.[30]

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[29] As the Court put it, "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." 538 U.S. at 423. The Court held:

> "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."

538 U.S. at 424.

[30] In *BMW* where the conduct was only "purely economic in nature," 517 U.S. at 576, the Court found such conduct unworthy of anything more than token punishment beyond compensatory damages. *Id. State Farm* made the same distinction: "[w]e have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic...." *State Farm* made clear that if the harm was only economic, reprehensibility would turn on whether the tortious conduct:

The conduct here is in stark contrast. The jury obviously found Lawnwood's offense despicable. To repeat, the trial judge described the evidence as essentially showing that Lawnwood set out to destroy Dr. Sadow's career in the community. The jury's finding of a specific intent to harm Dr. Sadow, together with its finding of actual harm, is the very incarnation of both express and actual malice. It was a purposeful act of malevolent destruction of the reputation of one of its surgeons, done repeatedly as a matter of policy.

A reasonable jury could conclude that repeatedly defaming the skill and proficiency of a practicing surgeon was likely to have significant and long-lasting public and professional consequences.[31] It could rationally have equated the slanders to feathers loosed into the wind, with no one ever knowing where they all landed or whom they touched. The effects could be seen as insidious and unknowable.[32] The jury could deem this the very worst institutional

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"evinced an indifference to or a reckless disregard of the *health or safety* of others; the target of the conduct had *financial vulnerability;* the conduct involved *repeated actions* or was an isolated incident; and the harm was the *result of intentional malice, trickery, or deceit,* or mere accident."

538 U.S. at 419.

[31] Jurors could fairly find that when a hospital speaks about the competency of a surgeon it speaks *ex cathedra*. As the pre-eminent institution of health care within the community, a jury could logically infer, a hospital's perceptions of the competency of its professionals should be taken as powerfully authoritative.

[32] *TXO* specifically approved consideration of harm "likely to result" as a factor supporting substantial punitive damages for malicious harm. 509 U.S. at 459-60.

wrongdoing conceivable — wicked enough for considerable punishment with a strong corrective impact on the defamer. Hence the applicable rule of decision for this case is really from *TXO:* extraordinary wrongdoing justifies extraordinary civil punishment without limiting ratios.

2. Proportionality

The United States Supreme Court has itself recognized a "compelling need for judicial redress of libelous utterances" equal to the compelling interests of the First Amendment.[33] The proportionality analysis in the federal decisions requires us to insure only that the reprehensibility of the *wrongdoing* — not the amount of actual harm or loss — is equivalent to the punishment. As we have also seen in Florida law, when a claim involves harm resulting from the intentionally malicious destruction of reputation, reprehensibility is not a function of any dollar loss involved.[34]

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[33] *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 347, 350, (1974) (so long as liability is based on fault States may define appropriate standard of liability for a publisher of defamatory falsehood injurious to a private individual; award of punitive damages must be based on actual malice); *Bose Corp. v. Consumers of United States Inc.*, 466 U.S. 485, (1984) (constitutional rule of independent review of determination of actual malice in defamation action recognized trial judge's opportunity to observe demeanor of witnesses). There is no question that the jury's finding of clear and convincing evidence of intentional falsity, harmful intent, and actual harm in this case satisfies *Gertz*.

[34] § 768.73(1)(c), Fla. Stat. (2009).

Nothing in *BMW* and *State Farm* hints how an arithmetical ratio used in cases of purely economic misconduct would function against this kind of premeditated calumny and the considerable harm the general consent of humankind recognizes is caused by it.[35] Indeed this may be precisely the case the Court had in mind in allowing exceptions to the ratio: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW,* 517 U.S. at 582-83.

Given the obvious enormity of the offense, the jury's role was to assess punishment powerful enough to be felt and deter further actions of the kind by one shown to be a repeat offender.[36] It was

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[35] It is a significant harm we ourselves have previously recognized in a case of strikingly similar circumstances. Substantial misconduct in the defamation of a physician was the subject in *Zambrano v. Devanesan,* 484 So.2d 603 (Fla. 4th DCA 1986), where in upholding an equally substantial award of punitive damages we said that "punitive damages are to be measured 'by the enormity of the offense, entirely aside from the measure of compensation of the injured plaintiff.'" 484 So.2d at 609. This case is identical to *Zambrano.*

[36] *See Owens-Corning Fiberglas Corp. v. Ballard,* 749 So.2d 483, 486 (Fla. 1999) (under Florida law purpose of punitive damages is not to further compensate plaintiff but to punish defendant for wrongful conduct and deter similar misconduct by it and other actors in the future); *Ingram v. Pettit,* 340 So.2d 922, 923-24 (Fla. 1976) (long established in Florida law that availability of punitive damages reserved to cases where private injuries partake of public wrongs, including intentional infliction of harm); *Zuckerman v. Robinson,* 846 So.2d 1257, 1258 (Fla. 4th DCA 2003) (punitive damages are premised on the enormity of the act resulting in the injury to the plaintiff).

required to fix a sum of money large enough to equal the reprehensibility of the wrongdoing and significant enough to punish and deter this particular actor. But this actor's assets exceed its liabilities by $100,000,000. A fine of $5,000,000 is thus only 5% of its net worth. Such a small part — if a roll of quarters symbolized net worth, just two of its coins — might rationally be thought by some as inadequate for a malicious defamer of such resources.[37]

State Farm and *BMW* hold damages reasonable when they "vindicate the State's legitimate interests in punishment and deterrence." 517 U.S. at 568. The Due Process Clause's concern for excessiveness is measured against the peculiar interests involved in the case. When the tortfeasor has a $100,000,000 pile of unencumbered wealth, nothing in federal or

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[37] In response to Lawnwood's argument that it could not have predicted the size of the punitive damages assessed by the jury, Dr. Sadow calls our attention to a few cases involving defamation claims in the health care setting. *See Reis v. Cedars Med. Ctr.*, 1995 WL 865054 (Fla. 11th Cir. Ct. Nov. 1995) ($3,334,857 verdict for defamation); *Prof'l Med. Educ., Inc. v. Palm Beach Co. Health Care Dist.*, 2007 WL 2197752 (Fla. 15th Cir. Ct. July 3, 2007) ($692,400 verdict for defamation, tortious interference with business relations and civil conspiracy); *Scheer v. Entel Radiological Assoc.*, 1989 WL 527221 (Fla. 6th Cir. Ct. Dec. 1989) ($1,856,927 verdict for plaintiff on defamation and breach of contract counts). To those, we take special note of our own decision in *Zambrano v. Devanesan*, 484 So.2d 603 (Fla. 4th DCA 1986) (affirming verdict of $700,000 in punitive damages for defamatory per se falsehood of physician by another staff physician). All of these cases arose in south Florida. All of them involve comparable parties and comparable amounts, and surface similarities with this case. None of them raise any concern suggesting excessiveness in the present case.

Florida law[38] suggests that 5% of that pile is arbitrary or excessive for maliciously and intentionally slandering a respected surgeon to destroy his professional reputation. The sum of $5,000,000 is legally equal to the reprehensibility of the intentionally malicious harm inflicted. That is the true application of federal proportionality in this punitive damages case. We conclude the jury's verdict was not disproportionate under federal law in the intended sense.

D. Jury Instruction and Verdict Form

In closing we find we must disclose an error in the jury instruction. Although the instruction and verdict form used in this case did not affect the outcome or our analysis on appellate review, we point out that the instruction may have resulted in the jury's failure to find even nominal compensatory damages for the slander per se.[39]

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[38] *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 432 (2001); *Engle*, 945 So.2d at 1262.

[39] The court followed Standard Jury Instruction MI 4.4, saying:

> If you find for Dr. Sadow, you shall consider the following elements of damage: any injury to reputation or health and any shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future.... *If you find for Dr. Sadow, but find that no damage has been proved, you* ***may*** *award nominal damages.* [e.s.]

Then the verdict form specified:

> Question 6: What is the amount of compensatory damages, if any, that Dr. Sadow has sustained as a result of slander by Lawnwood for injury to Dr. Sadow's reputation, health, and shame, humiliation, mental anguish and hurt feelings?
>
> A. experienced in the past: $_____

To repeat, *Commander v. Pedersen,* 116 Fla. 148, 156 So. 337, 341 (1934), held that "general damages ... are *conclusively presumed to result* " in cases of defamation per se. [e.s.] *See also Campbell v. Jacksonville Kennel Club,* 66 So.2d 495 (Fla. 1953) (words actionable per se import damage and *general damages are presumed to result and need not be proved*); *Wagner Nugent Johnson Roth Romano Erikson & Kupfer P.A. v. Flanagan,* 629 So.2d 113, 116 n. 4 (Fla. 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 558: "one who is liable for a slander actionable per se ... is liable for at least nominal damages."); *Myers v. Jim Russo Prison Ministries Inc.,* 3 So.3d 411 (Fla. 2d DCA 2009) (same); 19A FLA. JUR. 2D *Defamation and Privacy,* § 133. If the jury finds defendant liable for slander per se, it must be instructed that nominal damages are deemed established as a matter of law. It is error to instruct instead that nominal damages *may* be awarded *if you wish to do so.* Dr. Sadow's trial counsel raised this legal inconsistency in the verdict during post verdict proceedings but ultimately decided not to press the matter. Nonetheless on review we have presumed that slanders per se caused at least nominal damages.

B. to be experienced in the future: $_____

C. present value of future damages: $_____

D. total: $_____

Question 7: *If you find that Dr. Sadow has not proven any amount of compensatory damages, then do you wish to award nominal damages? And if so, in what amount? (if you elect not to assess nominal damages, then enter 0).* [e.s.]

$_____

We have emphasized the parts we find troublesome.

E. Conclusion

After giving the exacting appellate review of this case required under the de novo standard of *State Farm* and *BMW*, we conclude that the amount of punitive damages assessed conforms to applicable law and is neither excessive nor arbitrary so as to exceed federal Constitutional norms. Because the issue presented is of great public importance as to the imposition and assessment of punitive damages under Florida law for cases involving intentionally malicious, harmful defamation per se under *TXO*, *BMW* and *State Farm*, we certify to the Florida Supreme Court the following question:

> *Are punitive damages of $5,000,000 arbitrary or excessive under the Federal Constitution where the jury awarded no compensation beyond presumed nominal damages but found that defendant intentionally and maliciously harmed plaintiff by slanders per se?*

Affirmed.

CIKLIN, J. and LEBAN, MARK KING, Associate Judge, concur.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; James Midelis, Judge; L.T. Case No. 561999CA001429BC.

Arthur J. England Jr., Edward G. Guedes and Kerri L. McNulty of Greenberg Traurig, P.A., Miami, and William A. Kebler of Banker Lopez Gassler, P.A., St. Petersburg, for appellant.

Major B. Harding, John Beranek and Ruth E. Vafek of Ausley & McMullen, Tallahassee, and Richard H. Levenstein of Kramer Sewell Sopko & Levenstein, Stuart, for appellee.

Not final until disposition of timely filed motion for rehearing.

APPENDIX B

SUPREME COURT OF FLORIDA

LAWNWOOD MEDICAL CENTER, INC.,
Petitioner(s),

v.

SAMUEL H. SADOW, M.D.,
Respondent(s).

No. SC10-715.

[April 27, 2010]

This cause having heretofore been submitted to the Court on Certified Great Public Importance pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

QUINCE, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

SAMUEL H. SADOW, M.D.

Plaintiff,

CASE NO:
561999CA001429BC

vs.

LAWNWOOD MEDICAL CENTER, INC.
d/b/a LAWNWOOD REGIONAL
MEDICAL CENTER, a Florida
corporation,

Defendant.

_____/

FINAL JUDGMENT

The Plaintiff, SAMUEL H. SADOW, brought this action before the Court and the jury having rendered its verdict and the Court being otherwise advised in the premises, it is:

ADJUDGED that the Plaintiff, SAMUEL H. SADOW * * * shall recover from the Defendant, LAWN WOOD MEDICAL CENTER, INC. d/b/a LAWN WOOD REGIONAL MEDICAL CENTER, a Florida Corporation, * * * the sum of $6,517,000.00, which shall bear interest at the legal rate of interest, which is 11% per annum from October 10, 2007 until paid, for which let execution issue. This Court retains jurisdiction to enter further judgment for costs and to enter any further orders as required by law.

DONE and ORDERED in Chambers at Fort Pierce, St. Lucie County, Florida, on this 28th day of January, 2008.

/s/
Honorable James Midelis
Circuit Court Judge

APPENDIX D

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

SAMUEL H. SADOW, M.D.

Plaintiff, Case No.: 99-CA-1429 (BC)

vs.

LAWNWOOD MEDICAL CENTER, INC.
d/b/a LAWNWOOD REGIONAL
MEDICAL CENTER, a Florida
corporation,

Defendant.
_____/

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, and any fact of which the court has taken judicial notice.

In determining the facts, you may draw reasonable inferences from the evidence. You may make

deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

You have heard opinion testimony from persons referred to as expert witnesses. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

In this action, Dr. Sadow, as a member of the medical staff, and LAWNWOOD entered into a written contract described as the Medical Staff Bylaws. A contract is an agreement establishing the parties' rights and duties.

The duties of the Defendant under this contract relate to the exclusive contract for the open-heart surgery service, and Dr. Sadow's request for in-

creased clinical privileges, as contained in the Medical Staff Bylaws.

The issues for your determination on the claim of Dr. Sadow is whether the Hospital failed to perform its duties under the contract and, if so, whether that failure to perform was a legal cause of the damages sustained by Dr. Sadow.

* * *

The issues for your determination on the claim of Dr. Sadow against the Hospital for defamation is whether the Defendant through its Chief Financial Officer, Robert Dunwoody, made any statement concerning Dr. Sadow as Dr. Sadow contends; and, if so, whether any statement tended to injure Dr. Sadow in his business, reputation, or occupation.

If the greater weight of the evidence does not support the claim of Dr. Sadow on this issue, then your verdict should be for LAWNWOOD. However, if the greater weight of the evidence does support the claim of Dr. Sadow on this issue, then you shall consider the defense of rhetorical hyperbole.

Rhetorical hyperbole is an imaginative expression or a vigorous epithet; a statement that cannot be reasonably interpreted as stating actual facts about an individual.

If the greater weight of the evidence does support the claim of Dr. Sadow and does not support the defense of rhetorical hyperbole, then your verdict should be for Dr. Sadow, in the total amount of his damages.

Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for LAWNWOOD, you will not consider the matter of damages. But, if you find for Dr. Sadow, you should award Dr. Sadow an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Dr. Sadow for such damage as the greater weight of the evidence shows was caused by the statement complained of. A statement is a cause of damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage.

If you find for Dr. Sadow, you shall consider the following elements of damage:

Any injury to reputation or health and any shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any award should be fair and just in light of the evidence.

If you find for Dr. Sadow but find that no damage has been proved, you may award nominal damages. Nominal damages are damages of an inconsequential amount which are awarded to vindicate a right where a wrong is established but no damage is proved.

If you find for Dr. Sadow and against LAWNWOOD on defamation, you should consider, in addition to any award of compensatory, nominal damages, or no damages, whether punitive damages

are warranted in the circumstances of this case as punishment and as a deterrent to others.

The trial of the punitive damages issue is divided into two stages. In this first stage, you will decide whether the conduct of LAWNWOOD is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second stage during which the parties may present additional evidence and argument on the issue of the amount of punitive damages. I will then give you additional instructions, after which you will decide, in your discretion, the amount of punitive damages to be assessed.

Punitive damages are warranted if you find by clear and convincing evidence that LAWNWOOD's primary purpose in making the statement was to indulge ill will, hostility, and an intent to harm Dr. Sadow.

If you find for Dr. Sadow and against LAWNWOOD, and you also find that clear and convincing evidence shows that Robert Dunwoody was personally guilty of intentional misconduct which was a substantial cause of loss, injury, or damage to Dr. Sadow and that such conduct would warrant an award of punitive damages against him in accordance with the standards that I have mentioned, then in your discretion, you may determine that punitive damages are warranted against LAWNWOOD.

Intentional misconduct means that Robert Dunwoody had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to Dr. Sadow would result and, despite that

knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness of any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

When you retire to the jury room, you should select one of your number to act as foreperson to preside over your deliberations and sign your verdict. Your verdict must be unanimous; that is, your verdict must be agreed to by each of you.

You will be given a verdict form to fill out, which I shall now read to you:

[Read and explain verdict]

When you have agreed on your verdict, the foreperson, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

APPENDIX E

(caption omitted)

VERDICT FORM

WE, the jury, return the following verdict:

1. Did Lawnwood breach the Medical Staff Bylaws by denying Dr. Sadow's request for increased privileges in using an exclusive contract for the open-heart surgery service?

YES √ NO ___

If "YES", then answer Question 2. Otherwise, skip to Question 5.

2. What is the amount of damages, if any, that Dr. Sadow has sustained as a result of Lawnwood breaching the Medical Staff Bylaws?

a.	Past earnings	$2,817,000
b.	Future earnings	$ 0
c.	Present value of future earnings	$ 0
	Add 2(a) and 2(c) only for Total	$2,817,000

Answer Question 3.

3. Did Dr. Sadow fail to mitigate his damages by means that were reasonably available to him?

YES √ NO ___

If "YES", then answer Question 4. If "NO", then skip to Question 5.

4. What is the amount by which Dr. Sadow's total damages in Question 2 should be reduced because of his failure to mitigate damages?

$1,300,000

Answer question 5.

5. Did Lawnwood slander Dr. Sadow?

YES √ NO ___

If "YES", then answer Question 6. If "NO", skip the remaining Questions and sign this Verdict Form.

6. What is the amount of compensatory damages, if any, that Dr. Sadow has sustained as a result of slander by Lawnwood for injury to Dr. Sadow's reputation, health, and shame, humiliation, mental anguish, and hurt feelings:

a)	Experienced in the past:	$ 0
b)	To be experienced in the future	$ 0
c)	Present value of future damages	$ 0
d)	Add 6(a) and (c) only for total	$ 0

If you elect not to assess compensatory damages, then enter $0.00 in 6(d) and continue to Question 7. If you have awarded any amount of compensatory damages, then skip to Question 8.

7. If you find that Dr. Sadow has not proven any amount of compensatory damages, then do you wish to award nominal damages, and, if so, in what

amount? (If you elect not to assess nominal damages, then enter $0.00)

$ 0

Answer Question 8.

8. Under the circumstances of this case, state whether punitive damages are warranted against LAWNWOOD.

YES √ NO ___

Please date and sign this Verdict form and return it to the courtroom.

SO SAY WE ALL, this 5 day of October, 2007.

/s/
FOREPERSON

APPENDIX F

(caption omitted)

AMOUNT OF PUNITIVE DAMAGES—BIFURCATED TRIAL

The parties may now present additional evidence related to whether punitive damages should be assessed for the defamation by LAWNWOOD, and, if so, in what amount. In the first phase of this trial, you determined that LAWNWOOD breached a contract with Dr. Sadow and awarded damages for that breach. However, punitive damages may only be awarded for the defamation and not for the breach of contract. You should consider this additional evidence along with the evidence already presented regarding defamation, and you should decide any disputed factual issues by the greater weight of the evidence. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

You will now determine the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:

(1) the nature, extent and degree of misconduct and the related circumstances, including the following:

- whether the wrongful conduct was motivated solely by unreasonable financial gain;

- whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by LAWNWOOD;
- whether, at the time of the loss, injury, or damage to Dr. Sadow, LAWNWOOD had a specific intent to harm Dr. Sadow and the conduct of LAWNWOOD did in fact harm Dr. Sadow; and

(2) LAWNWOOD's financial resources.

However, you may not award an amount that would financially destroy LAWNWOOD.

You may in your discretion decline to assess punitive damages.

Your verdict on the issues raised by the punitive damages claim of Dr. Sadow against LAWNWOOD must be based on the evidence that has been received during the trial of the first phase of this case and on the evidence that has been received in these proceedings and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you.

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

APPENDIX G

(caption omitted)

JURY VERDICT FORM — PUNITIVE DAMAGES

WE, the jury, return the following verdict:

1. What is the total amount of punitive damages, if any, which you find, by the greater weight of the evidence, should be assessed against the Defendant? (If you elect not to assess punitive damages against Defendant, Lawnwood Regional Medical Center, you should enter a zero as the amount of damages, and sign and date the verdict form, if you enter any amount, please answer questions 2 and 3)

$5,000,000

2. At the time of loss, injury, or damage to Dr. Sadow, did Lawnwood have a specific intent to harm Dr. Sadow and did the conduct of Lawnwood, in fact harm Dr. Sadow?

YES √ NO ___

3. Was the wrongful conduct of Lawnwood motivated solely by unreasonable financial gain and was the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, actually known by Lawnwood?

YES ___ NO √

SO SAY WE ALL, this 10 day of October, 2007.

/s/
FOREPERSON

Supreme Court, U.S.
FILED
NOV 17 2010
OFFICE OF THE CLERK

175 (2)

No. 10-371

IN THE

Supreme Court of the United States

LAWNWOOD MEDICAL CENTER, INC.,

Petitioner,

v.

SAMUEL H. SADOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal applied this Court's guidepost analysis under the Fourteenth Amendment to an award of punitive damages for intentional harm.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal did not utilize state law to exempt a punitive award from the guidepost analysis, but rather used state law as a factor in that analysis.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal used the defendant's wealth to assess whether the state's interest in punishing and deterring egregious and willful defamation was served, without excessive punishment; where it relied on awards in similar cases as an indication that the defendant had fair notice that it could be liable for an award of the size at issue; and where the standard jury instructions used in Florida for this issue were submitted to the jury by agreement of all counsel.

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INTRODUCTION

Petitioner Lawnwood Medical Center, Inc. ("Petitioner" or "Lawnwood") has presented no compelling reasons for its Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner's arguments notwithstanding, the decision of the Fourth District Court of Appeal of Florida ("Fourth DCA"), one of five intermediate appellate courts in the state, neither conflicts with nor declines to follow decisions of this Court and other lower courts. In fact, although the District Court of Appeal certified a question relating to the punitive damages award to The Florida Supreme Court as having great public importance, the Florida Supreme Court denied review, without even allowing the submission of briefs. Lawnwood's request that the Florida Supreme Court take the case was denied in a two-sentence order. Pet. App. at 53a. The Florida Supreme Court would have reviewed the case only if it had found a conflict between District Courts of Appeal in Florida, or if it viewed the ruling as a matter of great public importance. Fla. R. App. P. 9.030.

In addition, the Florida District Court opinion at issue here was decided in conformance with this Court's decisions regarding punitive damages under the Fourteenth Amendment. The Petition repeatedly states that the Fourth DCA "expressly refused to apply the three guideposts" and "expressly declined to apply the five *State Farm* factors that define the reprehensibility guidepost. . . ." Pet. at 8. Nothing could be further from the truth. The court took careful consideration of this Court's precedents and applied this Court's directions

in a detailed 51-page opinion.[1] This opinion will be analyzed further below, but the court concluded at page 51 of its opinion:

> After giving the exacting appellate review of this case required under the de novo standard of *State Farm* and *BMW*, we conclude that the amount of punitive damages assessed conforms to applicable law and is neither excessive nor arbitrary so as to exceed federal Constitutional norms.

Pet. App. at 51a. The opinion, in sum, does not actually pose the questions set forth in the Petition; nor were all of the issues raised in the Petition properly preserved and raised below.

The Petition asserts that the Fourth DCA exempted punitive damages awarded for intentional harm from the three "guideposts" set forth by this Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). While the Fourth DCA concluded that the instant case was more similar to *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), it expressly applied the *BMW* guideposts. The Petition further asserts that the Fourth DCA ignored the reprehensibility factors enumerated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) and compared the size of the punitive award to Lawnwood's wealth rather than the plaintiff's harm. To the contrary, the court properly examined the proportionality between the punitive award and the *potential* damage resulting from

1. As formatted for an appendix to the Petition.

Lawnwood's conduct. It did not "redefine[] the 'proportionality' concern. . .to focus. . .on the relationship between the punitive award and the defendant's wealth." Pet. at 9. Rather, the Fourth DCA did analyze the impact of the award on Lawnwood, based on the intended functions of punitive damages, and wealth is properly a factor in that analysis. Moreover, Lawnwood did not object to the introduction of evidence at trial regarding its net worth, and did not present any evidence to controvert the assessment of that net worth. Finally, Lawnwood notably never appealed the appropriateness of a punitive damage award; rather, it made the sole argument on appeal that the amount of the award was excessive under the Fourteenth Amendment.

Pursuant to a *de novo* review, and in an opinion that relied heavily on this Court's opinions in *BMW*, *State Farm*, and *TXO*, the Fourth DCA held that a jury's award of $5 million in punitive damages against Lawnwood for its slander *per se* of Dr. Sadow did not violate Lawnwood's due process rights. The slander consisted of intentionally malicious statements by a top executive official at Lawnwood, its Chief Financial Officer ("CFO"), about a physician who was a member of its own medical staff, in the presence of other top executive officials, including its Chief Executive Officer ("CEO"). Lawnwood had more than fair notice of potential liability in this amount, based on awards in similar cases and the state's removal of statutory punitive damages caps for like conduct. Finally, the award is proportionate with the potential harm to Dr. Sadow, as well as the extreme reprehensibility of the conduct on which Lawnwood's liability was based. The Fourth DCA

emphasized Florida's strongly-expressed condemnation and disfavor of defamation, as a factor in its analysis. Contrary to Petitioner's assertions, the court neither ignored the punitive damage guideposts set forth by this Court in multiple opinions nor utilized state law to exempt this case from that guidepost analysis.

STATEMENT OF THE CASE

Contrary to the assertions in the Petition, this case is not one in which a jury simply awarded $0 in compensatory damages and $5 million in punitive damages. A jury found Lawnwood had breached a contract with Dr. Sadow, and awarded him $1,517,000 in compensatory damages for that breach. Pet. App. E. The jury award for breach of contract is not addressed by Petitioner in any substantive fashion. The jury also found, on a separate count for defamation, that Lawnwood had slandered Dr. Sadow, had "a specific intent to harm Dr. Sadow, and that the conduct of Lawnwood did, in fact, harm Dr. Sadow". Pet. App. at 64a, 68a. The jury then determined that a punitive damages award of $5 million was appropriate to punish Lawnwood for its willful and malicious defamation of Dr. Sadow, and Lawnwood seeks review of the amount of that award.

Dr. Sadow, who was a practicing surgeon with thoracic surgery privileges at Lawnwood, initially sued Lawnwood for breach of contract, as the result of Lawnwood's denial of his request for increased privileges. During the pendency of that action, he sought and received permission to amend his complaint to add a claim for defamation. As reflected in the Fourth

DCA opinion, the defamation claim arose because of a series of highly defamatory statements that a *top executive official* of Petitioner had made, during the pendency of the breach of contract claim, about Dr. Sadow's professional reputation, his ability as a surgeon, and his integrity. Pet. App. at 13a-16a. Thus, the Petitioner's reference to the defamation claim as "belatedly tacked on to the lawsuit" (Pet. at 4) is misleading and improper. The claim was added before the relevant statute of limitations expired. The Fourth DCA opinion simply does not raise the issue of the timing of the defamation claim, and certainly does not reflect that Petitioner appealed this issue.

The Fourth DCA opinion[2] exhaustively chronicles the events giving rise to the defamation claim. Pet. App. at 13a-17a. In summary, Lawnwood hired Dr. Pinon to staff Lawnwood's new walk-in clinic in Ft. Pierce. *Id.* at 13a. Among other comments, Lawnwood's CFO Mr. Dunwoody told Dr. Pinon, in the presence of Lawnwood's CEO, that Dr. Sadow was one of the "problem doctors" at Lawnwood, that Dr. Pinon should not send referrals to Dr. Sadow based on competency issues, and that Mr. Dunwoody "wouldn't send my dog for surgery to him." *Id.* at 13a-15a. The Fourth DCA opinion indicates that there was no retraction of any defamatory statements and that in its pleadings Lawnwood denied that any such statements had been made. *Id.* at 16a. Significantly, Lawnwood stipulated at trial that its denial of Dr. Sadow's request for increased privileges, which denial formed a part of the basis for Dr. Sadow's breach of contract claim, was not based on his competency or qualifications as a physician. *Id.* at 9a.

2. The full opinion is attached to the Petition as Appendix A.

The trial was bifurcated and tried before a single jury. Phase I, including both the breach of contract claim and the defamation claim, lasted approximately five weeks. In Phase I, the jury was asked to consider whether Lawnwood had defamed Dr. Sadow, and if it had, whether Dr. Sadow was entitled to compensatory, nominal, or punitive damages. Pet. App. D. During Phase I, evidence was introduced with regard to negative comments about other physicians made by Mr. Dunwoody, who was the CFO of Petitioner. Pet. App. at 14a, 16a, 30a. With regard to the defamation claim, the jury found in Phase I of the trial that Lawnwood had slandered Dr. Sadow and that punitive damages were warranted. Pet. App. E. The jury did what it was told in the agreed-upon jury instructions it could do: it awarded zero compensatory or nominal damages, but then indicated punitive damages were merited. Lawnwood did not appeal this portion of the verdict.[3]

After the jury decided in Phase I that punitive damages were warranted, evidence was presented to the jury in Phase II of the trial to assist the jury members in deciding on an appropriate amount of punitive damages. An expert witness for Dr. Sadow presented uncontroverted evidence of the net worth of

3. Although the jury instructions were not appealed, the Fourth DCA pointed out that a potentially erroneous jury instruction "may have resulted in the jury's failure to find even nominal compensatory damages for the slander per se." Pet. App. at 49a. The Fourth DCA stated that, if properly instructed, the jury would have had to award at least nominal damages, since in Florida general damages are *conclusively presumed* to result in cases of defamation per se." *Id.* at 50a (citations omitted).

Lawnwood being well in excess of $100,000,000 and the amount of punitive damages that it would take to financially disrupt Lawnwood. Pet. App. at 18a-19a. Finally, a witness for Lawnwood indicated that the administration had instituted a program to educate employees about defamation, but only *after* the jury's Phase I verdict, which had been returned only a few days previously. *Id.* at 19a.

The jury then determined, in a Phase II interrogatory regarding punitive damages for the slander, that Lawnwood had "a specific intent to harm Dr. Sadow" and that the conduct of Lawnwood did in fact harm Dr. Sadow. Pet. App. G. It imposed a verdict of $5 million in punitive damages against Lawnwood. During post-trial motion hearings, the trial judge noted that the jury could well have found, consistent with its answers on the verdict forms, that Lawnwood had set out to destroy Dr. Sadow. Pet. App. at 45a.

As reflected by the Fourth DCA opinion, Lawnwood appealed to the Fourth DCA based only on two narrow legal issues, only one of which is raised in its Petition here. Lawnwood appealed the award of $1,517,000 in compensatory damages for breach of contract on the basis of state law, but the Fourth DCA upheld the verdict and Lawnwood's petition here does not seek further review of this portion of the award.

The sole issue properly raised in the Petition is Lawnwood's assertion that the amount of the jury's $5 million assessment of punitive damages for slander *per se* of Dr. Sadow violated its due process rights under the Fourteenth Amendment to the U.S. Constitution and

therefore should be remitted. In its appeal to the Fourth DCA, Lawnwood did *not* raise or dispute the sufficiency of the evidence or the factual findings made by the jury. Again, Lawnwood appealed only the trial court's denial of its motion for remittitur, and acknowledged that the jury was entitled to impose punitive damages.

Utilizing this Court's guidance as set forth in multiple opinions, including those in *BMW*, *State Farm*, and *TXO*, the Fourth DCA thoroughly analyzed the appropriateness of the amount of the punitive damages awarded by the jury and determined that Lawnwood had not been denied due process thereby. Lawnwood mischaracterizes the Fourth DCA's analysis as raising certain questions that are appropriate for review by this Court. As discussed below, Lawnwood does not present accurate and compelling reasons to grant its Petition. Moreover, even under a *de novo* review, the result reached by the Fourth DCA was proper and should not be disturbed.

REASONS FOR DENYING THE PETITION

This punitive damages award does not merit review by this Court, and certainly does not merit the summary reversal requested by Petitioner. Petitioner essentially requests that this Court eviscerate the entire purpose behind punitive damages and ignore the legitimate state interests underlying such damages: namely, protecting citizens from malicious and intentional conduct of a type that can ruin lives, reputations and livelihoods.

In a line of cases including *BMW*, *State Farm*, and *TXO*, this Court has set out guideposts and factors to ensure defendants receive the benefit of due process when required to pay punitive damages. Due process under the Fourteenth Amendment prohibits arbitrary punitive damage awards. In deciding what constitutes an arbitrary award, this Court has required that defendants have fair notice of potential liability for their actions, and that punitive damages not be disproportionate to the actions on which they are based or to the ability of the defendant to pay. This Court has also stressed, in its line of cases on punitive damages, that a bright line cannot be drawn between a constitutional award and an unconstitutional award, and has emphasized the role of the state interests served by punitive damages, namely punishment and deterrence.

Lawnwood has requested that the $5 million punitive damages award against it be remitted to a mere $1,000. The Fourth DCA clearly concluded, in its extensively reasoned decision, that such a pittance would have absolutely no effect as a deterrent to or as a punishment, as against a corporation with an undisputed *net* worth of well over $100 million. As the Fourth DCA noted, even the $5 million award represents less than five percent of Lawnwood's net worth, "a small part – if a roll of quarters symbolized net worth, just two of its coins...." Pet. App. at 48a. Florida has enacted statutory caps on punitive damages, but removes those caps for instances, such as the one before this Court, in which "the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant." § 768.73(1), Fla. Stat. (2009). The

Petition appears to make an argument that this portion of the statute violates the Fourteenth Amendment, but if that is in fact what Petitioner is asserting, it did not ever raise the argument below.

In Florida, general damages are *conclusively presumed* to result in cases of defamation per se. Pet. App. at 36a (*citing Hartley & Parker v. Copeland*, 51 So.2d 789 (Fla.1951); *Commander v. Pedersen*, 116 Fla. 148, 156 So. 337 (1934); *Miami Herald Publishing Company v. Brown*, 66 So.2d 679, 680-81 (Fla.1953); and *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla.1953). Despite this presumption, and its specific finding that the defamatory conduct of Lawnwood did in fact harm Dr. Sadow (Pet. App. G), the jury appears to have used the punitive damages award to express its judgment, rather than apportioning such judgment between compensatory and punitive categories. This case, with its $0 nominal and compensatory award together with its $5 million punitive award, therefore appears to be unique and based on facts not likely to recur. Thus, review of this particular case by this Court is not necessary to provide guidance for Florida or other state courts in general. Moreover, the Fourth DCA opinion at issue does not contain the errors that Lawnwood claims in its Petition, as discussed below.

I. The Florida Fourth District Court of Appeal applied this Court's guidepost analysis under the Fourteenth Amendment to an award of punitive damages for intentional harm.

Contrary to Petitioner's assertions, the Fourth DCA did not ignore or refuse to apply the requirements laid out by this Court for reviewing punitive damage awards. Rather, it carefully considered this Court's opinions in *BMW*, *State Farm*, and *TXO*, and analyzed the award in accordance with those cases. It did distinguish the type of conduct at issue here with that at issue in *BMW* and *State Farm*, and noted that, under its reading of a series of decisions by this Court, and of specific language in *BMW* and *State Farm*, the "fixed ratio between punitive and compensatory damages was intended to apply primarily to the kind of 'wrongdoing' involved in [those two cases]." Pet. App. at 27a. The Fourth DCA quoted extensively from *BMW* and *State Farm* to support its analysis. It then looked to *TXO* for guidance as a case that involved intentionally malicious conduct, and that has not been retreated from or abrogated by this Court. Pet. App. at 27a-30a.

Lawnwood has focused in a narrow fashion on the three guideposts set forth in *BMW*. Lawnwood's narrow focus fails to address considerations that underlie a due process analysis of the amount of punitive damages, including punishment, deterrence, and *potential* harm, which this Court identified as a factor in the *BMW* "reprehensibility" guidepost but which Lawnwood entirely ignores. This Court has not indicated that the *BMW* guideposts are the exclusive factors to be considered in a due process analysis of punitive

damages, or that they must be narrowly applied to every imaginable case.

A factor of the deterrence analysis that this Court has recognized for due process purposes applies here; namely, whether the wrongful conduct produced a substantial or small amount of economic damages. *See State Farm*, 538 U.S. at 425. In some instances, if reckless conduct produces only a small or no amount of compensatory damages, a greater amount of punitive damages may be required to adequately send a message to the wrongdoer to refrain from engaging in that conduct again. As noted by the Fourth DCA, this Court stated in *BMW*:

> Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach.

Pet. App. at 26a, *quoting* 517 U.S. at 582.

Although the jury awarded Dr. Sadow compensatory damages only for his breach of contract claim, a "zero" verdict for compensatory damages on the defamation count does not excuse wrongdoing, particularly when the jury made a specific finding, despite the allocation

of its monetary awards, that the conduct of Lawnwood did in fact harm Dr. Sadow. Pet. App. at 68a. As noted *supra*, in Florida general damages are conclusively presumed as a result of slander per se. As the Fourth DCA discussed in its analyses of reprehensibility and proportionality, Dr. Sadow's potential damages from the slander were significant, and Lawnwood was properly on notice of that potential. Pet. App. at 45a and 48a, n. 37.

The Fourth DCA's opinion, like the jury's award, emphasizes the reprehensibility of Lawnwood's actions. See, e.g., Pet. App. at 33a-46a. The Fourth DCA characterized the defamation as "a purposeful act of malevolent destruction of the reputation of one of its surgeons, done repeatedly as a matter of policy." *Id.* at 45a. Moreover, the source of the defamation could be viewed as "powerfully authoritative." *Id.* at 45a, n. 31. Mr. Dunwoody, Lawnwood's CFO at the time, told Dr. Pinon that Dr. Sadow was one of the "problem doctors" at Lawnwood, that Dr. Pinon should not send referrals to Dr. Sadow based on competency issues, that Mr. Dunwoody "wouldn't send [his] dog for surgery to [Dr. Sadow]," and that if Dr. Pinon cared about his patients, he would not send those patients to Dr. Sadow for surgery. These statements were made in the presence of Lawnwood's CEO Mr. Pentz, without any demurral or objection by the latter. It is hard to imagine anything worse that could be said about a physician in the conduct of his profession.

Lawnwood's slander of Dr. Sadow was found by the

jury to be intentional, with a "specific intent" to harm him. This was not a case of a careless comment that was misconstrued by a listener. Instead, the evidence clearly showed that Lawnwood set out on a deliberate course to damage and even ruin Dr. Sadow. Lawnwood slandered him to a peer in the local medical community, a person whose opinion of Dr. Sadow could be expected to directly impact both Dr. Sadow's reputation in the community and his economic wellbeing through the potential loss of referrals. The Fourth DCA stated that a reasonable jury "could rationally have equated the slanders to feathers loosed into the wind, with no one ever knowing where they all landed or whom they touched. The effects could be seen as insidious and unknowable." Pet. App. at 45a.

Moreover, pursuant to a jury instruction proposed by Lawnwood itself, the jury members were instructed that if they found that Mr. Dunwoody was personally guilty of intentional misconduct regarding his slander of Dr. Sadow, then they could determine that punitive damages against Lawnwood were warranted. *Id.* at 60a.

II. The Florida Fourth District Court of Appeal did not utilize state law to exempt a punitive award from the guidepost analysis, but rather used state law as a factor in that analysis.

The Fourth DCA looked to this Court's opinions for authority to utilize state law as a factor in determining whether this punitive damages award satisfied Florida's strongly-expressed interest in punishing and deterring defamation. It quoted the following language from

BMW:

> In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Pet. App. at 26a-27a (internal citations omitted in opinion), *quoting BMW*, 517 U.S. at 569.

The Fourth DCA noted this Court's instruction to consider three guideposts when reviewing punitive damage awards: first, the degree of reprehensibility of the defendant's misconduct; second, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and third, the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. Pet. App. at 33a, *citing State Farm*, 538 U.S. at 418; *BMW*, 517 U.S. at 575. It then analyzed and applied the state law of Florida to measure the reprehensibility of Lawnwood's misconduct. Pet. App. at 35a-41a. Petitioner's assertion that the Fourth DCA "relied on

state law to create an exception to the three-guidepost constitutional analysis mandated by this Court" (Pet. at 18) is therefore not well founded.

III. The Florida Fourth District Court of Appeal used the defendant's wealth to assess whether the state's interest in punishing and deterring egregious and willful defamation was served, without excessive punishment.

Expert testimony presented by Dr. Sadow at trial indicated that Lawnwood's net worth measured well over $100 million. Significantly, Lawnwood presented no expert testimony of its own on this issue. Nor has Lawnwood asserted an inability to pay or that payment of the jury's $5 million award would bankrupt or destroy the Hospital. The only expert who testified at Phase II of the trial indicated that a punitive damages award in the range of $30-38 million would not financially destroy the hospital. Pet. App. at 19a. The Fourth DCA opined, in accordance with the evidence presented at trial, that an amount of punitive damages less than what the jury awarded may not perform the function of deterring further wrongdoing by Lawnwood. Furthermore, such evidence indicates that the jury's award of punitive damages was not based on mere "caprice." *See State Farm*, 538 U.S. at 418 (capricious jury awards discussed as one of the Supreme Court's concerns with regard to punitive damages).

This Court has confirmed that the proper proportionality inquiry is " 'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well

as the harm that actually has occurred.' " *BMW*, 517 U.S. at 581 (*quoting TXO*, 509 U.S. at 460 (emphasis in original)). Therefore, in determining whether the jury's punitive damages award violated Lawnwood's due process rights, it is proper to consider the *potential damages* of the defamation, as well as the actual damages awarded by a jury, and the pursuant compensatory damages in cases of slander per se, such as this one. *Id.* This analysis refers back to the underlying concern behind the due process limitations on punitive damages—namely, that a defendant should have fair notice of its potential liability for wrongdoing. As the Fourth DCA commented, Lawnwood had fair notice that the potential damages of defaming Dr. Sadow, a practicing physician, could lie in the millions of dollars. Pet. App. at 48a, n. 37.

Furthermore, evidence was presented at trial to show that Mr. Dunwoody made potentially defamatory comments about other physicians, in addition to Dr. Sadow. This Court has stated that evidence of harm to nonparties may be considered to show that the conduct that harmed the plaintiff in a case also poses a substantial risk of harm to the general public, and so is particularly reprehensible. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

There can be no mistake about the intentional malice of Lawnwood's statements. The evidence at trial demonstrated those statements could have had only one meaning and one objective: namely, to so demean the reputation of a physician in good standing at the hospital that his practice would be destroyed. Thus this case exactly fits the category described by this Court when

it noted that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582-83.

CONCLUSION

Petitioner Lawnwood has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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REPLY BRIEF

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In The

Supreme Court of the United States

LAWNWOOD MEDICAL CENTER, INC.,

Petitioner,

v.

SAMUEL H. SADOW,

Respondent.

On Petition for a Writ of Certiorari to The Court Of Appeal of Florida, Fourth District

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Dr. Sadow's reply cannot escape these stark realities: the Florida court determined reprehensibility based on state law rather than this Court's multifactor analysis, abandoned the ratio of punitive to compensatory damages in favor of comparing the punitive award to Lawnwood's wealth, and ignored the penalty that Florida prescribed for comparable conduct. In these ways, the Florida court refused to follow both this Court's guideposts and its procedures for their exacting, *de novo* application to the punitive award.

Dr. Sadow condones these significant departures from this Court's holdings because the Court left open the possibility that higher ratios of punitive to compensatory damages may be justified when compensatory damages are not substantial. Opp. 12, 17-18. Yet he does not dispute that this situation arises frequently, lower courts are deeply split over how to address it, and this case is a superior vehicle for resolving this important split. Pet. 31-36. The Court's guideposts must also inform this situation, not free States to make up their own eclectic criteria, as Dr. Sadow advocates.

Dr. Sadow's abandonment of the guideposts only highlights the worst problems of the Florida court's *ad hoc* approach: using exceptions to state punitive caps to make a defendant's ability to pay the sole constitutional limit; discarding the objective guideposts based on an incomplete reprehensibility analysis; singling out speech for severe punishment; and second-guessing jury damage findings with unsupported speculation about potential harm. The amicus briefs in *Shell Oil Co. v. Hebble*, No. 10-349, confirm that many of these problems are important and re-

curring. Allowing such departures from the established guideposts can only yield arbitrary and unpredictable results, not the uniform treatment of similar cases that is this Court's goal.

I. THIS CASE IS AN IDEAL VEHICLE TO SETTLE THE DIVISIVE AND RECURRING QUESTION OF HOW DUE PROCESS LIMITS PUNITIVE AWARDS WHEN COMPENSATORY DAMAGES ARE SMALL.

Dr. Sadow does not dispute that this $5 million punitive award may be the largest upheld since *BMW* in any case with little or no compensatory damages. Instead, he argues that the award is permissible because this Court left open the possibility of relaxing the ratio guidepost in some small-damage cases, such as those involving particularly egregious acts. Opp. 12, 17-18.

Yet the lower courts are divided over how to use ratio or other objective indicators to ensure that punitive awards are reasonable and proportionate when compensatory damages are not substantial. Pet. 31-36. Indeed, one of the *Hebble* amicus briefs confirms that many courts are abusing this Court's "particularly egregious acts" dictum, discarding the ratio guidepost altogether by subjectively deeming a defendant's conduct egregious without applying the five reprehensibility factors identified by this Court. Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioners at 8-12, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641633 ("PLAC Br."); see also Pet. 32 n.2.

That is precisely what the Florida court did here. Pet. App. 44a n.30, 47a; see Pet. 13, 16. Such "fail[ure] to diligently police the 'particularly egre-

gious' exception * * * insulate[s] from due-process review precisely those cases * * * where juries are most likely to grant arbitrary and excessive awards." *Bennett v. Reynolds*, 315 S.W.3d 867, 879 (Tex. 2010).

Dr. Sadow has no answer to this split, except to suggest that this case is unique and not likely to recur. Opp. 10. He is mistaken. The cases cited in the petition (at 32-33) show that substantial punitive damages frequently accompany limited actual damages, and this Court has recognized the importance of guidance for courts reviewing the constitutionality of punitive awards in such cases. *State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. at 582.

The Court has not yet reviewed such a case, however, and this petition provides an excellent vehicle for doing so. Dr. Sadow concedes that Lawnwood has preserved its due process challenge (Opp. 7-8), and the disparity here between the $5 million punitive award and $0 compensatory award vastly exceeds the 9:1 ratio that ordinarily marks the outer limit of what due process allows. *State Farm*, 538 U.S. at 425. The Court should resolve the split and provide a meaningful objective check on the size of punitive awards for cases where compensatory damages are not substantial.

II. THE FLORIDA COURT REFUSED TO APPLY THIS COURT'S GUIDEPOSTS, AND ITS HOLDINGS WILL HAVE PERVERSE EFFECTS IF ALLOWED TO STAND.

The Florida court's express refusal to follow this Court's guidepost cases alone warrants summary reversal. Yet its holdings are also spreading. Florida courts now limit "the full three-part analysis set

forth in [*State Farm* and *BMW*]" to cases involving "purely economic" harm. *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 76 (Fla. Ct. App. 2010).[1] If left unchecked, these decisions will stand as an invitation for States to dismantle the guideposts this Court carefully wrought to confine all punitive awards within the bounds of due process.

Dr. Sadow's brief confirms that Florida's holdings exempting large categories of cases from the guideposts are inimical to important constitutional values, including uniform and predictable treatment of similarly situated persons, free speech, and the right to trial by jury. The amicus briefs in *Hebble* also show that the Florida court's failure to analyze the five reprehensibility factors and its reliance on unsupported speculation about potential harm are important and recurring issues. These concerns should prompt this Court to make clear that exacting review of all guideposts is mandatory in all cases.

A. There can be no dispute that the Florida court refused to follow the guideposts. Merely reciting them is not enough; appellate courts must conduct an exacting, *de novo* review that applies the guideposts to the jury's punitive award. *State Farm*, 538 U.S. at 418. Although Dr. Sadow claims at the beginning of his brief that the Florida court did apply the guideposts (Opp. 1-4), he later concedes that it did not. Opp. 11, 15. He does not deny that other

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[1] Florida litigants are also using this case to argue that higher ratios are permissible under *TXO* even when compensatory damages are substantial. Appellee's Answer Brief at 22-24, *Philip Morris USA Inc. v. Hess*, No. 4D09-2666 (Fla. Ct. App. May 4, 2010), 2010 WL 2602780.

courts considering similar cases have applied the guideposts mandated by this Court. Pet. 28-31.

Reprehensibility: The Florida court declared Lawnwood's conduct reprehensible as a matter of state law simply because it intended to harm Dr. Sadow's reputation. Pet. 16. The court expressly disregarded the other four reprehensibility factors that this Court says must be considered, holding without support that they are limited to cases where the harm is merely economic. Pet. App. 44a n.30. Dr. Sadow does not defend this limitation or argue that the Florida court considered all five factors. Instead, he admits that the court "analyzed and applied the state law of Florida to measure the reprehensibility of Lawnwood's misconduct." Opp. 15. That analysis is not what this Court's precedent requires.

Other courts, including the court in *Hebble*, have similarly disregarded this Court's five-factor reprehensibility test in favor of a far more subjective reprehensibility review based on only one factor. *E.g.*, *Hebble v. Shell W. E&P, Inc.*, 238 P.3d 939, 947 (Okla. Civ. App. 2009) (intentional harm); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 810 (Wis. 2003) (Sykes, J., dissenting) (recidivism); see PLAC Br. 8-10; Brief of Amici Curiae Chamber of Commerce of the United States of America et al. in Support of Petitioners at 6-10, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641634 ("Chamber Br.").

This Court has held, however, that the existence of only one factor "may not be sufficient to sustain a punitive damages award." *State Farm*, 538 U.S. at 419. To ensure similar treatment for similar conduct, the Court should confirm that exacting review of all five reprehensibility factors is required.

Proportionality: The Florida court also expressly rejected the ratio or proportionality guidepost, holding that punishment "without limiting ratios" was proper and excluding actual harm from its analysis. Pet. App. 46a. Dr. Sadow concedes that the court limited the scope of the ratio guidepost to the kind of wrongdoing involved in *BMW* and *State Farm*. Opp. 11.[2] Surprisingly, he defends this limitation by arguing that the guideposts are too narrow and that courts should focus on vague considerations of fair notice, deterrence, and potential harm. Opp. 9, 11-12. To the contrary, this Court requires "[e]xacting," "*de novo*" review of the "application of [the guideposts] to the jury's award." *State Farm*, 538 U.S. at 418. While underlying state interests in punishment and deterrence may also be informative (Opp. 11), they were considered by this Court in creating the constitutional guideposts and thus provide no justification for disregarding them. *State Farm*, 538 U.S. at 416; *BMW*, 517 U.S. at 568, 574.

Dr. Sadow also offers two excuses for the Florida court's refusal to consider the proportionality of the punitive award to actual harm. Neither withstands scrutiny.

First, he suggests that some significance should be ascribed to the jury's $1.5 million award of com-

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[2] Dr. Sadow appears to suggest that the ratio guidepost was somehow waived because Lawnwood did not challenge the state-law decision that punitive damages for defamation can be awarded without actual damages. Opp. 3, 6, 8. Not so. As the petition explained (at 19), whether state law authorizes punitive damages is a different question from whether the resulting punitive award is unconstitutionally excessive.

pensatory damages for breach of contract. Opp. 4, 12. But breach of contract cannot support punitive damages. The jury was authorized to award punitive damages only for defamation, and the defamatory statements were distinct from the breaching conduct. Pet. 4-5. Damages unrelated to the conduct punished have no place in a due process review of punitive awards. *BMW*, 517 U.S. at 574 (fair notice of the "conduct that will subject him to punishment" and the "severity of the penalty" is required).

Second, Dr. Sadow asserts that the Florida court's consideration of potential harm from the defamation (Pet. App. 45a), as well as the state-law presumption of nominal damages from defamation per se (Pet. App. 50a), are enough to satisfy the guideposts. Opp. 2-3, 10-11, 13-14, 17. But presumed nominal damages of $1 cannot support a $5 million punitive award, and Dr. Sadow offered no evidence of potential harm above $1 from Lawnwood's conduct. This Court requires such evidence to uphold a punitive award based on potential harm. Pet. 26.

One of the *Hebble* amici observes that other courts have also used speculative assessments of potential harm to uphold otherwise-exorbitant ratios. PLAC Br. 13. Such unsupported speculation is the antithesis of due process because it allows each court to rely upon its own subjective, unpredictable reaction to a particular punitive award, resulting in different treatment of similar cases. Pet. 18.

Comparable penalties: Both Dr. Sadow and the Florida court studiously ignore the statutory penalty for libel chosen by Florida itself, which is only $1,000. Pet. 27-28. Such penalties should have special significance when actual damages are absent because they are the only objective guidepost available

to constrain excessive punitive awards. Here, the modest statutory penalty refutes the Florida court's premise that defamation is so egregious that it supports extraordinary punishment limited only by the defendant's ability to pay.

B. The fundamental flaw in the Florida court's opinion is not merely its failure to follow the guideposts, but also the serious consequences that flow from that failure. The court dismantled the guideposts for large categories of cases, including those involving intentional harm or any other conduct that state law excepts from a punitive damages cap. Dr. Sadow's brief vividly illustrates that the criteria the Florida court adopted in place of these guideposts create fundamental constitutional problems.

1. Dr. Sadow embraces the Florida court's holding that the State's removal of punitive damage caps gave Lawnwood fair notice of potential liability up to its ability to pay. Opp. 3, 9; Pet. App. 32a. Under this holding, any State can legislate away due process protections against excessive awards simply by giving notice that punitive damages will be unlimited. Any amount of punitives arbitrarily chosen by the jury will pass muster so long as it does not bankrupt the defendant. Such state-legislated arbitrariness is not fair notice of the severity of the penalty that may be imposed, and this Court has rightly rejected it as a substitute for exacting constitutional scrutiny of punitive awards. Pet. 19-20.

The consequences of Florida's approach will be far-reaching. The many state legislatures that capped punitive damages in certain cases as part of their tort reform efforts will be surprised to learn that they thereby nullified constitutional limits on punitive awards that were not capped. Similar con-

duct will be subject to different federal constitutional limits in each State. These results are flatly inconsistent with the uniform and predictable treatment of similarly situated persons guaranteed by the Due Process Clause.

Dr. Sadow is off base in emphasizing the Florida court's view that "reprehensibility is at its highest" in defamation cases because they have "Florida law's most severe condemnation, its highest blameworthiness, its most deserving culpability." Pet. App. 40a-41a; see Opp. 4, 15. The court's conclusion that the Constitution permits "extraordinary civil punishment without limiting ratios" for such "extraordinary wrongdoing" (Pet. App. 46a) is especially troubling because it gives no weight to the First Amendment. Courts should be more cautious when punishing speech; they should not hold that such punishment is essentially unlimited. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential * * * to inhibit the vigorous exercise of First Amendment freedoms."). At minimum, cases involving speech should bear the full weight of this Court's guidepost analysis. Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 505 (1984) (appellate court must independently examine the record to ensure that unprotected speech is narrowly defined and protected speech will not be inhibited).

Here, a hospital administrator said bad things about a doctor to one other doctor. Nothing about this speech gave Lawnwood fair notice that it could suffer perhaps the largest award of punitive damages for defamation ever to survive a constitutional challenge. Pet. 34. The jury was required to find in-

tent to harm in order to award any punitive damages, so that finding does not mark this case for a more significant punitive award. Pet. 5-6, 23-24; see Chamber Br. 7-8. Nor do the administrator's comments about other physicians show heightened reprehensibility, as there was no evidence that they were slanderous or caused actual harm. Pet. 24.

2. As to proportionality, Dr. Sadow's reliance on potential harm and presumed nominal damages does not give the jury's verdict the respect it is due under the Seventh Amendment. While the jury found that Lawnwood harmed Dr. Sadow, it was instructed to consider both past and future damages and found that both were $0. Pet. App. 64a-65a, 68a. The Florida court's speculation about potential harm subverts the jury's role, especially given that it is unsupported by any evidence submitted at trial.[3] See PLAC Br. 13.

Dr. Sadow's defense of the Florida court's focus on Lawnwood's wealth rather than his actual harm (Opp. 3, 9, 16) ignores this Court's holding that wealth is a poor objective guidepost because it "provides an open-ended basis for inflating awards" and "express[ing] biases." *State Farm*, 538 U.S. at 417, 427-28. Nor can wealth be smuggled into the analysis as an aspect of deterrence because the evidence showed that a less drastic award would have achieved that goal. Pet. 25.[4]

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[3] At most, the potential harm would have been Dr. Sadow's loss of at least one referral from Dr. Pinon, who heard the defamation. Pet. 5. That harm was never quantified.

[4] Dr. Sadow faults Lawnwood for not objecting to the introduction of wealth evidence (Opp. 3), but that evidence

In sum, the Florida court flouted due process by holding that intent to harm supported extraordinary punitive damages despite the jury's award of $0 for actual harm, and that wealth was the only real limit on that punishment. These holdings resulted in a grossly excessive punitive award that application of the guideposts would have prevented.

III. APPELLATE REVIEW OF PUNITIVE AWARDS WITHOUT APPLYING THE GUIDEPOSTS MANDATED BY THIS COURT DENIES PROCEDURAL DUE PROCESS.

Having previously recognized substantive constitutional limits on the size of punitive awards, this Court held that a State's inability to review the awards for excessiveness raised "a presumption that its procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 429-30. Later, after establishing the three due process guideposts, this Court held that they must be applied in a thorough, independent, *de novo* appellate review to assure "the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Indus.*, 532 U.S. at 436, 441. Now that the Court has established "specific procedures [and] substantive criteria essential to satisfy due process," there should be no disagreement that a court's failure or refusal to apply them is a procedural violation of the Due Process Clause. *Oberg*, 512 U.S. at 437-38 (Ginsburg, J., dissenting); *id.* at 436 (Scalia, J., concurring); see also *Cooper In-*

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was admissible under state law. Lawnwood's point is that this evidence, even if lawfully admitted and used at trial, should not play a role in the constitutional analysis. *State Farm*, 538 U.S. at 427-28.

dus., 532 U.S. at 443 (Thomas, J., concurring); Pet. 21.

By legislatively proclaiming the reprehensibility of intentional harm, contorting proportionality to measure only the defendant's wealth, and simply ignoring comparable penalties, Florida has done more than "classify arbitrariness as a virtue." *State Farm*, 538 U.S. at 417-18. It has ignored the procedure for appellate review this Court prescribed to ensure that state awards of punitive damages do not deny due process.

CONCLUSION

The Court should summarily reverse the judgment of the Florida Court of Appeal or, alternatively, grant certiorari and set this case for plenary review.

Respectfully submitted.

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